ORAL ARGUMENT REQUESTED BUT NOT YET SCHEDULED

CASE NO. 15-1184
(CONSOLIDATED WITH CASE NO. 15-1242)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

OZBURN-HESSEY LOGISTICS, LLC,
PETITIONER/APPELLANT,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/APPELLEE,

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION
INTERVENOR.

Petition for Review and Cross-Petition for Enforcement of a Decision and Order of the National Labor Relations Board

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DEFERRED APPENDIX - VOLUME II

Ben H. Bodzy
Stephen D. Goodwin
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
Baker Donelson Center, Suite 800
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ATTORNEYS FOR PETITIONER

January 7, 2016

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VOLUME II

9/9/2011

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

OZBURN-HESSESY LOGISTICS, LLC

and **Cases 26-CA-24057**
26-CA-24065
26-CA-24090

UNITED STEELWORKERS UNION

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

United Steelworkers Union, herein called the Union, has charged in Cases 26-CA-24057, 26-CA-24065 and 26-CA-24090 that Ozburn-Hessey Logistics, LLC, herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., herein called the Act. Based thereon, and in order to avoid unnecessary costs or delay, the Acting General Counsel, by the undersigned, pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, ORDERS that these cases be consolidated.

These cases having been consolidated, the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Order Consolidating Cases, Consolidated Complaint and Notice of Hearing and alleges as follows:

1.

(a) The charge in Case 26-CA-24057 was filed by the Union on June 9, 2011 and a copy was served by regular mail on Respondent on June 10, 2011.

(b) The first amended charge in Case 26-CA-24057 was filed by the Union on August 31, 2011 and a copy was served by regular mail on Respondent on September 1, 2011.

(c) The charge in Case 26-CA-24065 was filed by the Union on June 14, 2011 and a copy was served by regular mail on Respondent on June 16, 2011.

GC Exhibit 1 (m)

(d) The first amended charge in Case 26-CA-24065 was filed by the Union on August 31, 2011 and a copy was served by regular mail on Respondent on September 1, 2011.

(e) The charge in Case 26-CA-24090 was filed by the Union on July 18, 2011 and a copy was served by regular mail on Respondent on the same date.

(f) The first amended charge in Case 26-CA-24090 was filed by the Union on August 31, 2011 and a copy was served by regular mail on Respondent on September 1, 2011.

2.

At all material times, Respondent, a Tennessee limited liability company, with an office located in Brentwood, Tennessee and places of business located in Memphis, Tennessee, has been engaged in the business of transportation, warehousing and logistics services for other employers.

3.

(a) During the 12-month period ending August 31, 2011, Respondent, in conducting its business operations described above in paragraph 2, performed services valued in excess of $50,000 for employers located outside the State of Tennessee.

(b) During the 12-month period ending August 31, 2011, Respondent, in conducting its business operations described above in paragraph 2, purchased and received at its Memphis, Tennessee facilities goods valued in excess of $50,000 directly from points located outside the State of Tennessee.

4.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

6.

(a) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Shannon Miles	-	Senior Employee Relations Manager

Van Young	-	Regional Human Resources Manager
Phil Smith	-	Area Manager
Randall Coleman	-	Senior Vice President of Operations
Karen White	-	Regional Vice President
Wayne Morton	-	Operations Manager
Eric Nelson	-	Operations Supervisor
Alfreda Owens	-	Operations Supervisor
Brad Spellman	-	Operations Supervisor
LeRoy Heath	-	Operations Supervisor
John McAfee	-	Security Supervisor

(b) At all material times, Sara Wright held the position of Human Resources Assistant and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

7.

Respondent, by Area Manager Phil Smith, at its Memphis facility:

(a) About April 11, 2011, confiscated and removed union literature in an employee breakroom;

(b) About April 29, 2011, intimidated and threatened an employee with unspecified reprisals because of the employee's union or protected concerted activities;

(c) About May 26, 2011, threatened an employee with unspecified reprisals because of the employee's union or protected concerted activities;

(d) About June 28, 2011, told employees they should seek other employment because of their union sympathies and activities;

(e) About July 14, 2011, threatened an employee with discipline because of the employee's union or protected concerted activities.

8.

About April 11, 2011, Respondent, by Operations Supervisor Eric Nelson, at its Memphis facility, confiscated and removed union literature in an employee breakroom.

9.

About May 11, 2011, Respondent, by Human Resources Assistant Sara Wright, at its Memphis facility:

(a) Interrogated an employee about employees' union activities and sympathies; and

(b) Created an impression that employees' union activities were under surveillance.

10.

About May 25, 2011, Respondent, by Senior Vice President of Operations Randall Coleman and Security Supervisor John McAfee, at its Memphis facility, engaged in surveillance of employees engaged in union activities.

11.

About June 3, 2011, Respondent, by Regional Human Resources Manager Van Young, at its Memphis facility, interrogated an employee about the union activities of another employee.

12.

About June 22, 2011, Respondent, by Operations Supervisor Alfreda Owens, at its Memphis facility, confiscated and removed union literature in an employee breakroom.

13.

(a) About June 9, 2011, Respondent issued a final written warning to its employee Jennifer Smith.

(b) About June 14, 2011, Respondent discharged its employee Carolyn Jones.

(c) Respondent engaged in the conduct described above in paragraphs 13(a) and 13(b) because the named employees of Respondent joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

14.

By the conduct described above in paragraphs 7 through 12, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

15.

By the conduct described above in paragraph 13, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

16.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

17.

(a) As part of the remedy for Respondent's unfair labor practices alleged above, the Acting General Counsel seeks an Order requiring that Respondent hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the Notice to Employees is to be read to the employees by Senior Vice President of Operations Randall Coleman in English and, if necessary, other languages. The Acting General Counsel further seeks an Order requiring advance notice to the Board and the Union and allowing the Board and the Union to be present at the meeting or meetings when the Notice is read to employees.

(b) As part of the remedy for the unfair labor practices alleged above in paragraph 13(b), the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.

(c) The Acting General Counsel further seeks, as part of the remedy for the allegations in paragraph 13(b), that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

(d) The Acting General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before September 23, 2011 or postmarked on or before September 22, 2011.** Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at http://www.nlrb.gov, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. A failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If an answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT at 9 a.m. on October 3, 2011 and on consecutive days thereafter until concluded, a hearing will be conducted in the hearing room, National Labor Relations Board, 80 Monroe Avenue, Suite 350, Memphis, Tennessee, before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this (consolidated) complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Memphis, Tennessee, this 9th day of September 2011.

R K Hooks

Ronald K. Hooks, Director, Region 26
National Labor Relations Board
The Brinkley Plaza Building
80 Monroe Avenue, Suite 350
Memphis, TN 38103-2416

Attachments

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

(OVER)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

OZBURN-HESSESY LOGISTICS, LLC

and

UNITED STEELWORKERS UNION

Cases 26-CA-24057
26-CA-24065
26-CA-24090

ANSWER TO ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Pursuant to NLRB Rule 102.20, Ozburn-Hessey Logistics, LLC ("OHL") submits this Answer to Order Consolidating Cases, Consolidated Complaint and Notice of Hearing ("Complaint") and states as follows:

1.

OHL admits the allegations in Paragraph 1(a) of the Complaint.

OHL admits the allegations in Paragraph 1(b) of the Complaint.

OHL admits the allegations in Paragraph 1(c) of the Complaint.

OHL admits the allegations in Paragraph 1(d) of the Complaint.

OHL admits the allegations in Paragraph 1(e) of the Complaint.

OHL admits the allegations in Paragraph 1(f) of the Complaint.

2.

OHL admits the allegations in Paragraph 2 of the Complaint.

3.

OHL admits the allegations in Paragraph 3(a) of the Complaint.

OHL admits the allegations in Paragraph 3(b) of the Complaint.

4.

OHL admits the allegations in Paragraph 4 of the Complaint.

5.

OHL admits the allegations in Paragraph 5 of the Complaint.

6.

OHL admits the allegations in Paragraph 6(a) of the Complaint.

OHL admits the allegations in Paragraph 6(b) of the Complaint.

7.

OHL denies the allegations in Paragraph 7(a) of the Complaint.

OHL denies the allegations in Paragraph 7(b) of the Complaint.

OHL denies the allegations in Paragraph 7(c) of the Complaint.

OHL denies the allegations in Paragraph 7(d) of the Complaint.

OHL denies the allegations in Paragraph 7(e) of the Complaint.

8.

OHL denies the allegations in Paragraph 8 of the Complaint.

9.

OHL denies the allegations in Paragraph 9(a) of the Complaint.

OHL denies the allegations in Paragraph 9(b) of the Complaint.

10.

OHL denies the allegations in Paragraph 10 of the Complaint.

11.

OHL denies the allegations in Paragraph 11 of the Complaint.

12.

OHL denies the allegations in Paragraph 12 of the Complaint.

13.

OHL admits the allegations in Paragraph 13(a) of the Complaint, insofar as it issued a final written warning to Jennifer Smith on or about June 9, 2011. OHL denies that the warning was unlawful.

OHL admits the allegations in Paragraph 13(b) of the Complaint, insofar as it discharged Carolyn Jones on or about June 14, 2011. OHL denies that the discharge was unlawful.

OHL denies the allegations in Paragraph 13(c) of the Complaint.

14.

OHL denies the allegations in Paragraph 14 of the Complaint.

15.

OHL denies the allegations in Paragraph 15 of the Complaint.

16.

OHL denies the allegations in Paragraph 16 of the Complaint as OHL did not engage in any unfair labor practices.

17.

OHL denies that the NLRB is entitled to any relief whatsoever, and specifically denies the relief requested in Paragraph 17 of the Complaint is appropriate.

FIRST DEFENSE

The Complaint fails, in whole or in part, to state a claim upon which relief may be granted. As alleged, the allegations in the Complaint fail to state a claim that OHL violated the NLRA.

SECOND DEFENSE

The lack of specificity of the allegations in the Complaint are a violation of OHL's procedural due process rights under the U.S. Constitution.

THIRD DEFENSE

OHL would have taken the same disciplinary actions even if the referenced employees had not engaged in protected concerted activities or union activities.

FOURTH DEFENSE

None of OHL's alleged actions coerced, restrained, or interfered with the exercise of any employee's Section 7 rights.

FIFTH DEFENSE

As it relates to the allegations contained in Paragraph 11 of the Complaint, Region 26 never engaged in neutral fact-finding.

WHEREFORE, having fully answered the Complaint, OHL requests that the Complaint be dismissed with prejudice.

Respectfully submitted,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.

Ben H. Bodzy (#23517)
Baker Donelson Center, Suite 800
211 Commerce Street
Nashville, Tennessee 37201
(615) 726-5600

Stephen Goodwin (#006294)
First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
(901) 577-2141

Attorneys for Ozburn-Hessey Logistics, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Answer to Order Consolidating Cases, Consolidated Complaint and Notice of Hearing* was filed electronically. A copy has been served by e-mail and first-class United States mail, postage prepaid, this 23 day of September, 2011, upon:

:

Benjamin Brandon
USWA
3340 Perimeter Hill Dr.
Nashville, TN 37211

Ronald K. Hooks, Director, Region 26
National Labor Relations Board
The Brinkley Plaza Building
80 Monroe Avenue, Suite 350
Memphis, Tennessee 38103

Ben H. Bodzy

N MMS01 842110 v1
2902696-000044 09/23/2011

Van Young

6/3/11 ①

Kedric Smith.

Formal Investigation - Keep confidentia

We were in the breakroom, Phil came in & addressed everyone. Not addressing C. J. or anyone else.

Phil - came upstairs
Someone had called Phil stupid & he said watch who you talk to & who you hang around b/c they might not be your friends.

C. J. - She was very angry; her voice changed & body lang. - you could tell she was angry.

Phil walking away - got to the exit door - C. J. said something like go back to work - he came back - didn't have an attitude or anything but said C. J. you are making a big mistake saying what

GC Exhibit 5

(2)

you are saying.
C.J. said something but I don't remember what then Phil said watch your back but he was calm didn't get in her face— wasn't threatening to her.

Phil then left — C.J. put her food up & was saying ya'll heard that — like Phil & everybody here was against her.

C.J. was saying things to certain friends she had about this (Mary & Annie) there were others but I don't remember.

I was sitting at the table up front by refrig. C.J. over by microwave & ice machine. Phil was in the front of room not talking to anyone in particular.

Phil didn't say "ya'll are stupid" — no — everyone would have gotten offended

He just said watch who you hang with.
After he left, she was having private conversations (Mary + Annie) trying to put words in their heads!

When Phil said watch your back she tried to act like she felt threatened & she was trying to put that in people's head but it was like that – it wasn't a threat.

C.J. tries to start things. She is smart & tries to make things more than they are b/c she thinks she has the union on her side.

Then she went downstairs where Nat Geo was mtg.
B/4 lunch we had our FisKar's mtg & she asked ? just like every time in mtgs. but then she starts debating w/mgrs.

(4)

LeRoy will ask anyone if they have Ds b/c he knows to wait until the end for C.J. b/c she will talk over everyone & they won't have a chance.

Why did you sign her statement? It was a blank page that she asked us to sign. I thought she was getting a list of names of pp. that were there. There was no statement there.

Phil only said watch your back once, C.J. was talking to everyone in the room & said Phil said it twice but I was standing right beside them & I didn't hear it.

Didn't hear anything about Obama or stupid white people. She was already there when I got upstairs.

She always tries to make it like everything is a conspiracy against

(5)

anyone who wants to be in the union.

C.J. is trying to get some pp. terminated – LeRoy is her target I heard her tell Latoya that she wanted Latoya to write a statement that LeRoy came on to her sexually. She also said she had other girlfriends who she was trying to get to write these statements.
Latoya said she wasn't go to do that b/c LeRoy hadn't done anyone like that to her.
I was dropping off a pallet & heard this.

LeRoy wouldn't do something like that – C.J. spreads rumors about LeRoy dating pp. – Denise Martin. Her so called friend – how you can be friends w/someone who says you are sleeping w/your boss. C.J. says Denise goes to [redacted] LeRoy's office for lunch.
Denise knows about the rumors

(6)

but just blows them off.

Has C.J. tried to solicit you for the Union while you were working on the floor (on the clock)?
Yes, many times. Still solicits but not tried to talk to me on the floor in 2-3 months. She was doing this once or twice a week - trying to get me to sign up for the Union while I was working.
Her friends at Waterpic also do this - I was done there for a week or two helping out + her friends were trying to solicit me while I was working. They knew I was working. Don't know their names.

The above statement (16 pages) is a true and accurate account of my statement of events.

Kedric Smith Jure 3-11

5/26/11

12:15 - 1:00

@ lunch time Phil Smith and I had conversation about something he said two co-worker said that I said, I told him that no one called anyone stupid, that it was stupid for my people not to know or be educated ~~about~~ about Union, that we need to find out about Union with homework. Then I told Phil not to address me with what Jennifer an Katrina said, that to go work and finish your meeting at that time Phil walked out the door and then

GC Exhibit 10

turn around, came back and told me, I better watch my back, not once but twice, I mean you better watch your back.

Carolyn Jones

1. Troy Hughlett
2. Alvin Ingram
3. Kedric Smith
4. James Bailey
5.
6.
7.
8.
9.
10.

Van Young 6/3/11

Troy Hughlett

C.J. asked me if I heard what Phil said about watch your back & I said yes.

She asked me to write my name on a piece of paper b/c she needed witnesses. there was nothing written on the paper but a list of numbers. there wasn't a statement. She just wanted me to sign my name as a witness.

Troy Hughlett 6/3/11

GC Exhibit 18

James Bailey 6/6/11

James states that at the time he signed THE paper was BLANK. He never seen or read Carolyn's statement. States she asked if he heard the conversation between her and Phil and he stated yes and signed the paper, but what he signed did not have her statement on it.

James Bailey 6/6/11

GC Exhibit 21

Annie Ingram

Carolyn asked her if she heard the conversation. States that she only asked if she heard the conversation. At the time she signed, no statement was on the paper. States she did not see statement because the paper was blank. She only signed after answering Carolyn yes that she heard the conversation.

Annie Ingram
6/6/11

GC Exhibit 23

OHL is a supply chain management solutions provider which is based in Tennessee and operates throughout the world. OHL was founded in 1951 in Nashville, TN and has long standing customer relationships, some dating back to the company's inception.

OHL operates throughout the world and is one of the largest logistics companies. OHL is owned by New York-based private equity firm Welsh, Carson, Anderson & Stowe.

OHL operates 3 business units:

The **Contract Logistics** business unit manages over 120 facilities representing 28 million ft^2/2.6 million m^2 of space primarily in the US, and also has facilities in Canada, UK, Singapore, Netherlands and China.

The **North America Transportation** business unit provides brokerage, distribution and transportation management services. They handle over 700,000 shipments per year and are primarily a non-asset based business.

The **Global Freight Management and Logistics** business unit provides customs brokerage and air and ocean freight forwarding services. In 2008, OHL processed 800,000 customs transactions and over 100,000 air and sea shipments.

OHL serves customers in the

- apparel
- chemical
- electronic
- food and beverage
- publishing
- consumer packaged goods
- *and many other industries.*

The company specializes in temp-controlled distribution and direct to consumer fulfillment. OHL offers multi-customer campus distribution centers which allow customers to place products as close to end users as possible and also keep costs low by providing shared space, labor and technology.

While OHL has grown significantly, the commitment to providing excellent customer service and upholding the highest standards of integrity remain as essential to the success of the company as they were in 1951.

OHL can be reached at 877-401-6400 and at www.ohl.com

Complaint Procedure

Reporting an Incident of Harassment, Discrimination or Retaliation

OHL strongly urges the reporting of all incidents of discrimination, harassment or retaliation, regardless of the offender's identity or position. Individuals who believe they have experienced conduct they believe is contrary to OHL's policy or who have concerns about such matters should file their complaints with their supervisor, the Director of HR or any member of HR. Further, any management team member who knows of or hears of any possible harassment, discrimination or retaliation must notify the Director of HR or another member of HR. Individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other OHL designated representatives identified above.

Important Notice to All Employees

Employees who have experienced conduct they believe is contrary to this policy have an obligation to take advantage of this complaint procedure. Employees' failure to fulfill this obligation could affect their rights in pursuing legal action.

Early reporting and intervention have proven to be the most effective method of resolving actual or perceived incidents of harassment. Therefore, while no fixed reporting period has been established, OHL strongly urges the prompt reporting of complaints or concerns so that rapid and constructive action can be taken.

The availability of this complaint procedure does not preclude individuals who believe they are being subjected to harassing conduct from promptly advising the offender that the behavior is unwelcome and requesting that it stop.

The Investigation

Any reported allegations of harassment, discrimination or retaliation will be investigated promptly. The investigation may include individual interviews with the parties involved and, when necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge. Confidentiality will be maintained throughout the investigation process to the extent consistent with adequate investigation and appropriate corrective action.

Responsive Action

Misconduct constituting harassment, discrimination or retaliation will be dealt with appropriately. Responsive action may include, for example, training, referral to counseling and/or disciplinary action up to and including termination, as OHL believes appropriate under the circumstances. Employees who

21. Violation of Company rules.

22. Gambling on Company property.

23. Inviting or escorting a non-employee onto Company premises without approval from the manager.

24. Reading unauthorized literature or "surfing" the internet during working time.

25. Sleeping on duty.

26. Violation of the Company's solicitation/distribution rules.

27. Posting, altering or removing any items on the bulletin board or on Company property without proper authorization.

28. Smoking, eating or drinking in an unauthorized area.

29. Failure to cooperate with an internal investigation, including: failure to be forthright, open or truthful; withholding information or evidence concerning matters under review or investigation; fabricating information or evidence or conspiring with another to do so.

30. Customer complaints or violation of customer's policies.

31. Unprofessional or inappropriate conduct, as determined by management.

32. Unsatisfactory work performance.

33. Utilizing cell phones in unauthorized areas or at unauthorized times.

Nothing in this policy alters the at-will employment relationship between OHL and its employees.

COMMENDATIONS

Managers are provided with a method for recognizing an employee's performance that goes above and beyond their normal duties. This type of performance is notable and may result in increased profitability and customer service for the Company. Employees may receive written commendations for exceptional outstanding performance as well as financial or non-financial rewards.

HERE'S WHAT THEY THINK ABOUT US

In a last ditch effort to convince us that a union is not needed at OHL, top mangement has turned their employees into: GUN PACKING, TIRE SLASHING, SCAB KILLING, BULLHORN YELLING, DRIVE BY SHOOTING, VIOLENT GANGBANGING, BEASTLIKE SAVAGES! How can they say that your best interest is at heart when you are viewed in a manner such as this? Quite simply put the employees are only asking for decent wages, and fair treatment, but OHL has insisted that their open door policy will save you from all the problems that exsist today. Is OHL out of touch with reality, or do they think that we are **Ignorant, Brainless, Zombies?**

R-[illegible]

EXHIBIT R-21

Employee Separation Form

Employee Information

Employee Name: Ashley Burgess | Effective Date: 9/27/2010

Employee ID: 013144 | Last Day Worked: 9/17/2010

Type of Separation

Check the appropriate box below: Involuntary	Check the appropriate box below: Voluntary
☐ Attendance Violation	☐ Change in Career
☐ Deceased	☐ Did not like the job
☐ Failed to Meet I-9 Requirements	☐ Hours
☐ Ineligible for Leave	☐ Money
☐ Lack of Work	☐ Other
☐ Laid Off (RIF)	☐ Other Employment
☐ Other	☐ Quit without Notice
☐ Poor Performance	☐ Relocation
☐ Resignation	☐ Resignation
☐ Safety Violation	☐ Retired
☑ Violated Company Policy	☐ Unknown
	☐ Went Back to School

Company Property Collected

☑ Badge	☐ Laptop and other computer equipment	☐ Blackberry, pager, cell phone
☐ Air Card	☐ Keys (office, files, building)	☐ Office Files
☑ Time Card	☐ Tools	

Was employee notified?	☑ Yes ☐ No	How ?	Termination meeting
Did the employee give notice? *(If so, please obtain written documentation and attach.)*	☐ Yes ☐ No	How much?	N/A
Is employee eligible for rehire?	☐ Yes ☑ No		
PTO / Vacation Payout:	☐ Yes ☐ No	How much?	0.42
Was an exit interview been conducted?	☐ Yes ☑ No		
Is severance being paid?	☐ Yes ☑ No	How much?	

Approval Signatures

Supervisor/Manager: _____ Corp HR: _____

Field HR: Ann Hanley 9/27/10 Payroll: _____

Created June 2010

STATE OF TENNESSEE
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF EMPLOYMENT SECURITY

SEPARATION NOTICE

1. Employee's Name: Ashley L. Burgess 2. SSN 413-39-6297
3. Last Employed: From: 11/15/04 to 9/27/10 Occupation: Operator I
4. Where was work performed? 5540 E. Holmes Rd., Memphis, TN 38118
5. Reason for Separation: ☐ Lack of Work ☒ Discharge ☐ Quit
If lack of work, indicate if layoff is ☐ Permanent ☐ Temporary
If temporary, when do you expect to recall this individual? _____ (Date)
If other than lack of work, explain the circumstances of this separation:
Inappropriate Behavior
6. Employee received: ☐ Wages In Lieu of Notice ☐ Separation Pay ☐ Vacation Pay
In the amount of $ _____ for period from _____ to _____

Employer's Name: Ozburn-Hessey Logistics

Address where additional information may be obtained:
7101 Executive Center Drive Suite 333 (Street)
City: Brentwood State: TN Zip Code: 37027

Employer's Telephone Number: 615-401-6425 (Area Code) (Number)

EMPLOYER'S ACCOUNT NUMBER

0	4	5	0	6	1	9	6

(Number shown on State Quarterly Wage Report (LB-0851) and Premium Report (LB-0456))

I certify that the above worker has been separated from work and the information furnished hereon is true and correct. This report has been handed to or mailed to the worker.

Ordencia A. Haney
Signature of Official or Representative of the Employer who has first-hand knowledge of the separation.

Regional HR Mgr.
Title of Person Signing

9/27/10
Date Completed and Released to Employee

NOTICE TO EMPLOYER

Within 24 hours of the time of separation, you are required by Rule 0560-1-1-.02 of the Tennessee Employment Security Law to provide the employee with this document, properly executed, giving the reasons for separation. If you subsequently receive a request for the same information on LB-0810, please give complete information in your response.

NOTICE TO EMPLOYEE

TAKE THIS NOTICE TO THE LABOR AND WORKFORCE DEVELOPMENT OFFICE IF YOU WISH TO FILE A CLAIM FOR UNEMPLOYMENT INSURANCE BENEFITS.

LB-0480(R.7/01) INTERNET RDA N/A

Appeals Tribunal
Tennessee Department of Labor & Workforce Development
Employment Security Division, Nashville, Tennessee 37243-1002
(800)344-8337 (615)741-1857

NOTICE OF TELEPHONE HEARING
AVISO IMPORTANTE

SS NUMBER: 413-39-6297

DOCKET NUMBER: 10-23077-AA
Mailing Date: November 12, 2010

Claimant

ASHLEY BURGESS
3892 INNSBROOK DR.
MEMPHIS TN 38115-0000
(901) 273-3038

Employer

OZBURN HESSEY LOGISTICS LLC
ATTN: HUMAN RESOURCES
5540 HOLMES RD
MEMPHIS TN 38118-0000
(901) 546-0006

Date: Wednesday, November 24, 2010
Time: 02:30pm Central Time

Hearing Officer: W. Chadwick
Local Office: 107

BY TELEPHONE

THIS HEARING CONCERNS AN APPEAL FILED BY THE CLAIMANT PURSUANT TO TCA § 50-7-304(C)
ISSUE(S):

TCA §50-7-303(a)(1) & (2) Whether claimant left work voluntarily without good cause or was discharged for misconduct.

IMPORTANT INSTRUCTIONS:
PLEASE READ CAREFULLY THE ENCLOSED INSTRUCTIONS CONCERNING YOUR APPEALS HEARING.
If you are represented by an attorney, please have the attorney submit a signed Notice of Appearance with the attorney's complete name, address,phone number and your signature. Rule 0560-3-4-.05
Any documents to be considered during your hearing must be submitted to the Appeals Tribunal & the opposing party prior to the hearing.
If your hearing is scheduled by telephone and you want an in-person hearing, please contact the Appeals Tribunal immediately.
NOTE: Este es un aviso importante relacionado con sus beneficios de desempleo.
If the telephone number is incorrect, or not listed, please notify Appeals Tribunal at the telephone numbers above, or you can E-MAIL changes to [appeals.scheduler@state.tn.us].

CC:

Ozburn Hessey Logistics
% Thomas & Thorngren, Inc
P O Box 280100
Nashville, Tn 327228-0100
615-242-8246

FAILURE OF THE EMPLOYER TO APPEAR FOR A SCHEDULED HEARING BEFORE THE APPEALS TRIBUNAL OR THE BOARD OF REVIEW COULD RESULT IN ERRONEOUS PAYMENTS WHICH MAY BE CHARGED TO YOUR ACCOUNT IF THE CLAIM IS APPROVED.

CLAIMANT MAY NOT BE REQUIRED TO REPAY BENEFITS IF THE OVERPAYMENT RESULTS FROM THE FAILURE OF THE EMPLOYER TO APPEAR FOR A SCHEDULED HEARING. (TCA 50-7-304(b)(2)(D), AS AMENDED).
THE CLAIMANT MUST CONTINUE TO FILE WEEKLY CERTIFICATIONS DURING THE APPEAL IF HE/SHE REMAINS UNEMPLOYED.

LB-0953

Investigation – K.C. Foster/Ashley Burgess – Dukal Account

Issue – K.C. Foster and Ashley Burgess got into a profane exchange on the warehouse floor

Witnesses – Tara Neal – Team Lead - Dukal

K.C. Foster – Operator I – Dukal Account

It was at the end of the shift. Tara and Ashley were talking. He started talking to Ashley saying something about her calling people monkey. States Ashley does that often and others don't like. Wasn't meaning any harm just expressing to her that people don't like it. He stated to her to not call others she worked with Monkey. Mentioned that Austin was from Chicago and he didn't play that and that Austin had said that if she calls him a monkey again that he would knock her ass out. States from that Ashley just started going off. Next thing he knows Ashley is calling him a Pussy. States that Ashley said "you ain't nothing but a Pussy Ass Nigger. States he was at the desk to fill out his OEP card and just mentioned it to her about her calling others monkey and didn't know she would go off like that. States Ashley was pointing the pen while she was saying all kinds of things. States he told her she needed to be careful because she was just a little girl and he could be her daddy. States he took her pen and threw it down at the desk and it bounced onto the floor. States he did not throw the pen toward Ashley he just threw it down. States that the two of them were going back and forth he doesn't remember all they were saying because the matter blew up so fast. States he then remembers Tara telling him to go to the clock and clock out. States he asked her why you telling me to clock out and not her. Tara replied I just need you two to separate. States he went on to the clock and clocked out. States he had agreed to go to work over in the McClean Powers account and was not going to go because he was so upset but he went ahead and cooled down and went down to the other building to work in the McClean account.

Ashley Burgess – Operator II - Dukal

Tara and Ashley were at Terri Chesier desk talking about a quote they found on facebook. States that K.C. just came and butted in their conversation. States he was talking about something about an order. States she didn't know what he was talking about. States he then stated "you are going to get enough of calling people a monkey." States she responded "Gone on Monkey face." States they just went back and forth. States that she did not call him a pussy ass nigger until after she had hit the clock. States she told Tara he was acting like a pussy ass

nigger. States that while the two were arguing, K.C. snatched her pen out of her hand and threw it on the floor. States she told him to pick up her pen and K.C. responded "I ain't picking shit up." States she picked the pen up herself. States that after he threw the pen on the floor, Tara told K.C. to go to the clock. States he walked away and went said something to Vince and Austin and then went and clocked out. Doesn't know what he said. She states she and Tara went to clock out and that is when she stated to Tara "he's been acting like a pussy ass nigger all day."

HR note – Employee was very reluctant to cooperate with the investigation. She was reluctant to be forthcoming with information. Had to be forced almost to give a statement. Stated on several occasions that "whatever ya'll going to do just do it." During the initial interview exhibited extreme reluctance to participate in the interview. Only until HR stated that if she did not willfully participate in the investigation that it would be noted and the only evidence that would be weighed is that of the other participant and the other witness. She then decided to participate but still with some reluctance.

Tara Neal – Operations Lead – Dukal

Ashley and Tara were at Terri Chesier(Ops Supv) desk talking about something on Facebook. K.C. came up to the desk to fill out his OEP card. States K.C. then interrupted their conversation. States that Ashley responded to him "no one is talking to you Monkey." States that K.C. responded "I have told you not call me a monkey. You need to stop calling Austin that too because he don't play like that." Ashley responds "he ain't never came to me and told me that ole Pussy ass Nigger." Tara states she shouted to Ashley "Ashley don't say that." Ashely responds "he is a pussy ass nigger." K.C. responds "I don't play like that, I am a grown ass man. You could be my child." States that Ashley then went into a rage and started cursing at K.C. and pointing her pen in his face. States that K.C. snatched the pen out of her hand and threw it down. States that the pen broke and K.C. still had half of the pen in his hand. Ashley responds "Give me my motherfucking pen." And K.C. replied "I don't have your motherfucking pen." States she shouted to K.C. to go to the clock and K.C. asked her why he had to go to the clock? She replied I just need yourtwo to separate. States they both used profanity, just don't remember what all was said because it blew up so fast.

TENNESSEE DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT
EMPLOYMENT SECURITY DIVISION
DECISION OF APPEALS TRIBUNAL

AVISO IMPORTANTE

DATE OF MAILING: 12/03/2010

DOCKET # 10-23077AA
OFFICE # 107
BYE 09/24/2011

CLAIMANT
ASHLEY BURGESS
3892 INNSBROOK DR.
MEMPHIS TN 38115 0000

EMPLOYER
OZBURN HESSEY LOGISTICS LLC
ATTN: HUMAN RESOURCES
5540 HOLMES RD
MEMPHIS TN 38118-0000

SSN XXX-XX-6297
901-273-3038

ER # 0599159
901-546-0006

On September 28, 2010, the claimant filed an initial claim for unemployment benefits. On October 18, 2010, the Agency found that the claimant was discharged under disqualifying conditions. In accordance with T.C.A. § 50-7-303(a)(2), the claimant was disqualified from receiving benefits until she has earned ten times the weekly benefit amount in covered employment. On October 21, 2010, the claimant filed an appeal from the decision of the Agency to the Appeals Tribunal. After due notice to all interested parties, a telephone hearing was scheduled on this case, on Wednesday, November 24, 2010, at which time the claimant appeared and testified. The employer appeared and was represented by Tammie Johnson, Human Resources Generalist, who testified on behalf of the employer.

After carefully considering the testimony and the entire record in the case, the Appeals Tribunal makes the following:

FINDINGS OF FACT: The claimant's most recent employment prior to filing this claim was as an operator II for Ozburn Hessey Logistics from November 15, 2004 through September 27, 2010. The claimant was discharged for exhibiting inappropriate behavior and using inappropriate language directed towards a co-worker during an altercation on August 27, 2010.

The claimant was issued a final written warning and accompanying three day suspension in late 2009 for a similar incident which placed her on notice that any additional violations of the employer's policy in the following year would result in her termination.

The claimant was aware that her job was in jeopardy and of the employer's policy banning confrontations and the use of profane or inappropriate language at the workplace; however, on August 27, 2010, the claimant was involved in another altercation at the workplace with a co-worker. On August 27, 2010, the claimant was speaking with the team lead when they were interrupted by a co-worker who had a question regarding the work. The conversation then escalated between the co-worker and the claimant during which the claimant became loud and disruptive while using profanity directed towards and in reference to the co-worker. The claimant was then instructed to leave for the day and the employer initiated an investigation into the matter. At the conclusion of the investigation which involved witness interviews and communication with the corporate office, the claimant was notified of her termination on September 27, 2010.

LB-0952

CONCLUSIONS OF LAW: The Appeals Tribunal holds that the claimant is disqualified from receiving unemployment compensation benefits. The issue in this case is whether the claimant was discharged for misconduct connected with her work, as provided in T.C.A. § 50-7-303(a)(2). Misconduct is a willful or controllable breach of a claimant's duties, responsibilities, or behavior that the employer has a right to expect. Misconduct may be an act or an omission that is deliberately or substantially negligent, which adversely affects the employer's legitimate business interests. Simple negligence without harmful intent is not misconduct, nor is inefficiency, unsatisfactory conduct that is beyond the claimant's control, or good faith error of judgment or discretion. The burden of proving misconduct rests on the employer and in this case, the employer has met its burden of proof.

The evidence establishes that the claimant was discharged and a finding of misconduct has been substantiated. In this case the claimant acknowledged in her testimony that she was aware of the employer's policy violated and that her job was in jeopardy. She also acknowledged her involvement in an altercation with a co-worker during which she became loud and disruptive while using profane and inappropriate language in reference and directed towards the co-worker. We find that sufficient evidence and testimony was submitted to establish that the claimant's actions constitute misconduct and that the employer has met the burden of proof required as set forth by Tennessee Employment Security Law.

The Appeals Tribunal holds that the claimant's actions rise to the level of misconduct connected with her work.

DECISION: The Agency Decision is affirmed. The claimant is not eligible for unemployment benefits under T.C.A. § 50-7-303(a)(2). The claim is denied as of September 28, 2010, and until the claimant qualifies for benefits in accordance with the Tennessee Employment Security Law.

WC :dlw

/s/ William Chadwick
Unemployment Appeals Hearing Officer

Pursuant to the provisions of TCA § 50-7-304(c), this decision will become final on 12/18/2010 unless any interested party makes a written appeal to the Board of Review, Tenn. Dept of Labor and Workforce Development, 220 French Landing Dr., Nashville, TN 37243-1002 (Fax (615) 741-0290).
If the last day for filing falls on a weekend or holiday, the deadline extends to the next business day.
Please include the claimant's Social Security number on all correspondence.

Claimant is responsible for certifying his/her eligibility on a weekly basis as long as he/she is unemployed.

Este es un aviso importante relacionado con sus beneficios de desempleo.

LB-0952

EXHIBIT R-22

Employee Separation Form

Employee Information

Employee Name: James Griffin | Effective Date: 6/14/2011

Employee ID: 005446 | Last Day Worked: 6/14/2011

Type of Separation

Check the appropriate box below: Involuntary	Check the appropriate box below: Voluntary
☐ Attendance Violation	☐ Change in Career
☐ Deceased	☐ Did not like the job
☐ Failed to Meet I-9 Requirements	☐ Hours
☐ Ineligible for Leave	☐ Money
☐ Lack of Work	☐ Other
☐ Laid Off (RIF)	☐ Other Employment
☐ Other	☐ Quit without Notice
☐ Poor Performance	☐ Relocation
☐ Resignation	☐ Resignation
☐ Safety Violation	☐ Retired
☑ Violated Company Policy	☐ Unknown
	☐ Went Back to School

Company Property Collected

☑ Badge	☐ Laptop and other computer equipment	☐ Blackberry, pager, cell phone
☐ Air Card	☐ Keys (office, files,building)	☐ Office Files
☑ Time Card	☐ Tools	

Was employee notified? ☑ Yes ☐ No How ? mtg w/HR

Did the employee give notice? ☐ Yes ☑ No How much?
(If so, please obtain written documentation and attach.)

Is employee eligible for rehire? ☐ Yes ☑ No

PTO / Vacation Payout: ☐ Yes ☑ No How much? -7.71

Was an exit interview been conducted? ☐ Yes ☑ No

Is severance being paid? ☐ Yes ☑ No How much?

Approval Signatures

Supervisor/Manager: [signature] Corp HR: Shannon Miles

Field HR: Van Young Payroll:

On June 2 I closed a and really for got to call the Carrie for the load so as the days go by I got an email from Jessica Rostad saying she need sign BOL for them orders. I didnt want to tell her that they never picked up so thats when I called ABF and they came right and picked up the load so thats when I changed the date on the BOL and scan it to her. I know I was wrong for this. I apologize for my mistake.

James Stuffins

AEG TRANS# NO EEI 30.36

6/01/11

BILL OF LADING

Page 1

SHIP FROM

GERBER LEGENDARY BLADES
5510 EAST HOLMES RD

MEMPHIS, TN 38118-7948
SID#: FOB: ☐

Bill of Lading Number: 00136580002356519

(402) 00136580002356519

SHIP TO

HOME HARDWARE
34 HENRY STREET

ST. JACOBS, ON N0B 2N0
CID#:337495 FOB: ☐

CARRIER NAME: ABF Freight Systems
Trailer number: ABFS 01
Seal number(s): 85600

SCAC: ABFS

ABF Freight System 009 646 193 | Total Pages

Driver signature only acknowledges receipt of freight. Shipment is subject to applicable terms and conditions of Uniform Straight Bill of Lading and ABF's tariffs.

5

THIRD PARTY FREIGHT CHARGES BILL TO:

Freight Charge Terms: *(freight charges are prepaid unless marked otherwise)*
Prepaid _____ Collect X 3rd Party _____

SPECIAL INSTRUCTIONS: Underlying Bols
Stop #: 00136580002356496
Stop #: 00136580002356502
Multiple Stop Load

☑ (check box) Master Bill of Lading: with attached underlying Bills of Lading

CUSTOMER ORDER INFORMATION

CUSTOMER ORDER NUMBER	# PKGS	WEIGHT	PALLET/SLIP (CIRCLE ONE)		ADDITIONAL SHIPPER INFO MUST DEST	TYPE	DEPT	ARRIVE BY
			Y	N				
See Attached Underlying			Y	N				
Bills Of Lading			Y	N				
			Y	N				
			Y	N				
			Y	N				
GRAND TOTAL	4	151						

CARRIER INFORMATION

HANDLING UNIT QTY	HANDLING UNIT TYPE	PACKAGE QTY	PACKAGE TYPE	WEIGHT	H.M. (X)	COMMODITY DESCRIPTION (Commodities requiring special or additional care or attention in handling or stowing must be so marked and packaged as to ensure safe transportation with ordinary care. See Section 2(e) of NMFC Item 360.)	LTL ONLY NMFC #	LTL ONLY CLASS
						See Attached Underlying		
						Bills Of Lading		
1		4		151		GRAND TOTAL		

Carriers liability for loss, damage or delay is limited to:
$ _____ per lb
$ _____ per shipment (truckload)
Shipper: By:

COD Amount: $ _____
Fee Terms: Collect: ☐ Prepaid: ☐
Customer check acceptable: ☐

NOTE Carrier's liability is for the actual loss unless otherwise agreed in contract, or stated above and signed by Shipper.

RECEIVED, subject to the written transportation contract between shipper and carrier, if applicable, otherwise subject to the terms and conditions of the shipper's standard transportation contract in effect on the date of shipment, which is available to the carrier on request. This shipment is not subject to any classification or tariffs which may be established by the carrier.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

_____ Shipper Signature

SHIPPER SIGNATURE / DATE

This is to certify that the above named materials are properly classified, described, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the DOT.

6/2/11

Trailer Loaded:
☒ By Shipper
☐ By Driver

Freight Counted:
☐ By Shipper
☒ By Driver/pallets said to contain
☐ By Driver/Pieces

CARRIER SIGNATURE / PICKUP DATE

Carrier acknowledges receipt of packages and required placards. Carrier certifies emergency response information was made available and/or carrier has the DOT emergency response guidebook or equivalent documentation in the vehicle. *Property described above is received in good order, except as noted.*

ABFS SWP 6/2/11

ABS TRANS# NO EEI 30.36

6/01/11

BILL OF LADING

Page 1

SHIP FROM

GERBER LEGENDARY BLADES
5510 EAST HOLMES RD

MEMPHIS, TN 38118-7948
SID#: FOB: ☐

SHIP TO

HOME HARDWARE
34 HENRY STREET

ST. JACOBS, ON N0B 2N0
CID#:337495 FOB: ☐

THIRD PARTY FREIGHT CHARGES BILL TO:

Bill of Lading Number: 00136580002356519

(402) 00136580002356519

CARRIER NAME: ABF Freight Systems
Trailer number: ABFS 01
Seal number(s): 85600

SC
Pr ABF Freight System 009 646 193
Total Pages

Driver signature only acknowledges receipt of freight. Shipment is subject to applicable terms and conditions of Uniform Straight Bill of Lading and ABF's tariffs

5

Freight Charge Terms: *(freight charges are prepaid unless marked otherwise)*
Prepaid _____ Collect X 3rd Party _____

☒ (check box) Master Bill of Lading: with attached underlying Bills of Lading

SPECIAL INSTRUCTIONS: Underlying Bols
~~Stop #: 00136580002356496~~
Stop #: 00136580002356502
Multiple Stop Load

CUSTOMER ORDER INFORMATION

CUSTOMER ORDER NUMBER	# PKGS	WEIGHT	PALLET/SLIP (CIRCLE ONE)		ADDITIONAL SHIPPER INFO MUST DEST	TYPE	DEPT	ARRIVE BY
			Y	N				
See Attached Underlying			Y	N				
Bills Of Lading			Y	N				
			Y	N				
			Y	N				
			Y	N				
GRAND TOTAL	4	151						

CARRIER INFORMATION

HANDLING UNIT QTY	HANDLING UNIT TYPE	PACKAGE QTY	PACKAGE TYPE	WEIGHT	H.M. (X)	COMMODITY DESCRIPTION (Commodities requiring special or additional care or attention in handling or stowing must be so marked and packaged as to ensure safe transportation with ordinary care. See Section 2(e) of NMFC Item 360)	LTL ONLY NMFC #	LTL ONLY CLASS
						See Attached Underlying		
						Bills Of Lading		
1		4		151		GRAND TOTAL		

Carriers liability for loss, damage or delay is limited to:
$_____ per lb
$_____ per shipment (truckload)
Shipper: _____ By _____

COD Amount: $ _____
Fee Terms: Collect: ☐ Prepaid: ☐
Customer check acceptable: ☐

NOTE Carrier's liability is for the actual loss unless otherwise agreed in contract, or stated above and signed by Shipper.

RECEIVED, subject to the written transportation contract between shipper and carrier, if applicable, otherwise subject to the terms and conditions of the shipper's standard transportation contract in effect on the date of shipment, which is available to the parties on request. This shipment is not subject to any classification or tariffs which may be established by the carrier

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

_____ Shipper Signature

SHIPPER SIGNATURE / DATE

This is to certify that the above named materials are properly classified, described, packaged, marked and labeled and are in proper condition for transportation according to the applicable regulations of the DOT

40X48X38

Trailer Loaded:
☒ By Shipper
☐ By Driver

Freight Counted:
☐ By Shipper
☒ By Driver/pallets said to contain
☐ By Driver/Pieces

CARRIER SIGNATURE / PICKUP DATE

Carrier acknowledges receipt of packages and required placards. Carrier certifies emergency response information was made available and/or carrier has the DOT emergency response guidebook or equivalent documentation in the vehicle. Property described above is received in good order, except as noted.

ABFS (Carrier) 6-3-2011

Edwards Faulkner

OHL

Ernest Lowery:

Rating: 3

Tia is working to become proficient with the new system, and the level of work output while learning a new LMS system meets expectations.

Attendance & Punctuality

Consider the number of days absent and tardy. Also consider how often notification is received in advance of the absence.

Number of Points to date:

- **Outstanding: Never tardy or absent.**
- **Exceeds Expectations: Consistently reports to work on time. Gives more than adequate advance notice.**
- **Meets Expectations: Seldom tardy or absent. Gives proper notification. No progressive counseling documentation during this appraisal period.**
- **Needs Improvement: Occasionally must be reminded about tardiness/absenteeism or proper notification. Has been counseled on attendance during this appraisal period.**
- **Unsatisfactory: Excessive tardiness and/or absenteeism. Fails to give proper notice when absent. Has received final counseling step during this appraisal period.**

Ernest Lowery:

Rating: 3

Tia comes to work daily as scheduled. If she will be late or miss work due to an unforseen circumstance, she always notifies management in a timely manner.

Safety

Consider the extent to which safety actions are exhibited and to which preventions are exercised. Also consider cleanliness and orderliness of the work area.

- **Outstanding: Sets examples for others to follow in safety issues. Work area always immaculate. Contributes ideas for improved safety. No incidents for at least one year.**
- **Exceeds Expectations: Consistently demonstrates good safety awareness. Work area consistently clean and well organized. Makes suggestions regarding loss prevention in any work area. No counseling for unsafe acts.**
- **Meets Expectations: Maintains safe, orderly, and clean work area. Can be relied upon to work safely.**
- **Needs Improvement: Generally works in safe manner, but has to be occasionally reminded. Frequently must be reminded to clean and organize work area. Has been counseled on safety during this appraisal period.**
- **Unsatisfactory: Work habits are extremely unsafe. Must continuously be urged to clean and organize work area. Unsafe acts have contributed to an incident during this appraisal period. Has received counseling during this appraisal period.**

Ernest Lowery:

Rating: 3

Tia's position does not require her to be on the warehouse floor more than one hour a day - making any safety concerns minimal. She is aware of OHL's safety policy and adhere's to the rules set forth therein.

Customer Focus OHL/USW 0700

Consider the dedication to meeting the expectations and requirements of both the internal and external customer.

- **Outstanding: Sets example for others. Goes beyond the standard toy demonstrate respect, responsiveness, flexibility, and professionalism while providing superior service for our internal and**

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

STIPULATED ELECTION AGREEMENT

OZBURN-HESSEY LOGISTICS, LLC **Case 26-RC-8635**

The parties agree that a hearing is waived, that approval of this Agreement constitutes withdrawal of any notice of hearing previously issued in this matter, that the petition is amended to conform to this Agreement, and further **AGREE AS FOLLOWS:**

1. SECRET BALLOT. A secret-ballot election shall be held under the supervision of the Regional Director in the unit defined below at the agreed time and place, under the Board's Rules and Regulations.

2. ELIGIBLE VOTERS. The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced. The employer shall provide to the Regional Director, within seven (7) days after the Regional Director has approved this Agreement, an election eligibility list containing the full names and addresses of all eligible voters. **Excelsior Underwear, Inc.** 156 NLRB 1236; **North Macon Health Care Facility**, 315 NLRB 359.

3. NOTICE OF ELECTION. Copies of the Notice of Election shall be posted by the Employer in conspicuous places and usual posting places easily accessible to the voters at least three (3) full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

4. ACCOMMODATIONS REQUIRED. All parties should notify the Regional Director as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, and request the necessary assistance.

5. OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

6. TALLY OF BALLOTS. Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

7. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

8. RECORD. The record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

9. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c). (*Insert commerce facts.*)

Initials BB

Union 13

Date approved: 6/24/11

RK Hooks

Regional Director, Region 28
National Labor Relations Board
Ozburn-Hessey Logistics, LLC,
Case No. 26-RC-8635

Initials BB
BB

SIDE AGREEMENT
IN
Ozburn-Hessey Logistics, LLC
26-RC-8635

The parties agree that the job classification of Administrative Assistant is in dispute and have agreed to not place it in the inclusions or the exclusions of the Stipulated Election Agreement. Rather, the parties have agreed that the two administrative assistants Tia Harris and Rachel Maxie will vote subject to challenge by the Union. The Employer takes the position that the administrative assistants should be included in the Unit description while the Union takes the position that the administrative assistants should be excluded from the Unit description. If the challenged ballots of the administrative assistants are determinative to the outcome of the election, the parties have agreed to resolve the matter in a post-election hearing and allow each party to present its evidence that supports its position.

Mike Jeannette — 6-23-11
Mike Jeannette, Board Agent — Date

Employer Representative — Date

Union Representative — 6-23-11
Date

Union Ex. 13(a)

FORM EXEMPT UNDER 44 U S C

FORM NLRB-502 (2-08)

UNITED STATES GOVERNMENT NATIONAL LABOR RELATIONS BOARD PETITION

DO NOT WRITE IN THIS SPACE	
Case No	Date Filed
26-RC-8635	06/14/2011

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1 PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made) (Check One)

- ☒ **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees
- ☐ **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner
- ☐ **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - **A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.**
- ☐ **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded
- ☐ **UC-UNIT CLARIFICATION**- A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees (Check one) ☐ In unit not previously certified ☐ In unit previously certified in Case No _____
- ☐ **AC-AMENDMENT OF CERTIFICATION**- Petitioner seeks amendment of certification issued in Case No _____ Attach statement describing the specific amendment sought

2 Name of Employer	Employer Representative to contact	Tel No
Ozburn-Hessey Logistics, LLC	Van Young HR Manager	(901)546-0006

3 Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)			Fax No
5510 Holmes Road	Memphis	TN 38118	(901)541-2671

4a Type of Establishment (Factory, mine, wholesaler, etc)	4b Identify principal product or service	Cell No ( ) -
Warehouse	Warehousing and distribution	e-Mail

5 Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification)	6a Number of Employees in Unit
Included See attachment	Present 300
Excluded See attachment	Proposed (By UC/AC) 0
(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)	6b Is this petition supported by 30% or more of the employees in the unit?* ☒ Yes ☐ No *Not applicable in RM, UC, and AC

7a ☐ Request for recognition as Bargaining Representative was made on (Date) _____ / / and Employer declined recognition on or about (Date) _____ / / (If no reply received, so state)

7b ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act

8 Name of Recognized or Certified Bargaining Agent (If none, so state)	Affiliation
None	

Address	Tel No ( ) -	Date of Recognition or Certification / /	
	Cell No ( ) -	Fax No ( ) -	e-Mail

9 Expiration Date of Current Contract, If any (Month, Day, Year)	10 If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year)
/ /	/ /

11a Is there now a strike or picketing at the Employer's establishment(s) Involved? Yes ☐ No ☒	11b If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) / /

12 Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above (If none, so state)

Name	Address	Tel No ( ) -	Fax No ( ) -
		Cell No ( ) -	e-Mail

13 Full name of party filing petition (If labor organization, give full name, including local name and number)

United Steel, Paper and Forrestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. AFL-CIO-CLC

14a Address (street and number, city, state, and ZIP code)	14b Tel No EXT	14c Fax No
3340 Perimeter Hill Drive	(615)834-8590	(615)781-6362
Nashville TN 37211	14d Cell No (804)519-4640	14e e-Mail bbrandon@usw org

15 Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)

Same as above.

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)	Signature	Title (if any)
Benjamin Brandon	Benjamin Brandon	Organizer

Address (street and number, city, state, and ZIP code)	Tel No (615)834-8590	Fax No (615)781-6362
Same as above	Cell No (804)519-4640	eMail bbrandon@usw org

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

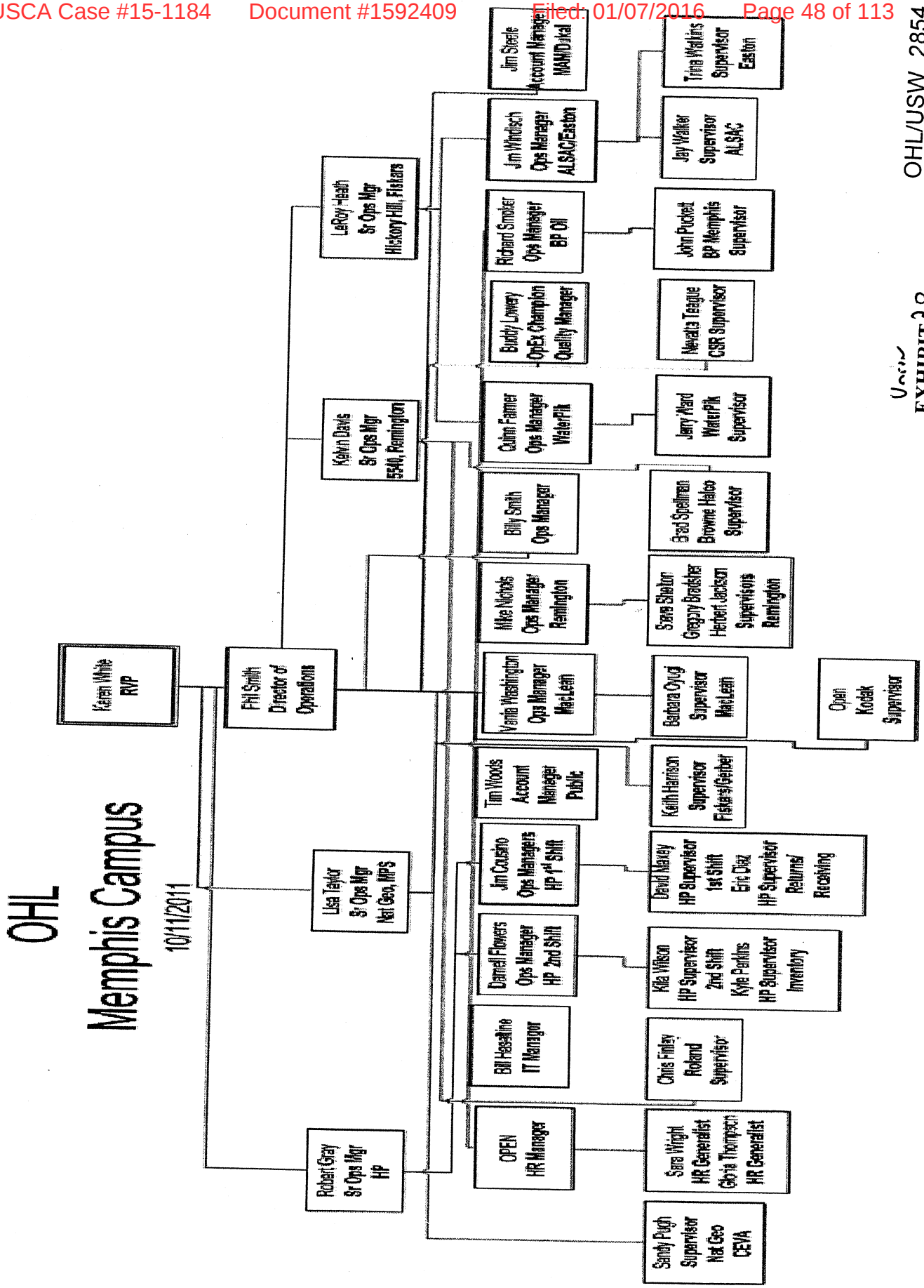
PRIVACY ACT STATEMENT 26-2011-1159

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

ATTACHMENT TO PETITION

Included:
All full-time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at its Memphis, Tennessee facility.

Excluded:
All other employees, including, office clerical and professional employees, guards, and supervisors as defined in the Act.



OHL/USW 2854

EXHIBIT 20

FORM NLRB-760
(12-82)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Ozburn-Hessey Logistics, LLC
Employer

and

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Petitioner

Case No. 26-RC-8635 | Date Filed 6/14/2011

Date Issued 07/27/2011

Type of Election *(Check one:)*
- [X] Stipulation
- [ ] Board Direction
- [ ] Consent Agreement
- [ ] RD Direction

Incumbent Union *(Code)*

(If applicable check either or both:)
- [ ] 8(b) (7)
- [ ] Mail Ballot

TALLY OF BALLOTS

358

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 358
2. Number of Void ballots 0
3. Number of Votes cast for USWA 165
4. Number of Votes cast for .....
5. Number of Votes cast for .....
6. Number of Votes cast against participating labor organization(s) 164
7. Number of Valid votes counted (sum of 3, 4, 5, and 6) 329
8. Number of Challenged ballots 14
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 343
10. Challenges are (not) sufficient in number to affect the results of the election.
11. ~~A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for~~ Petitioner

DATE: 7/27/11
TIME: 5:25

For the Regional Director, Region 26 David W. Thuss

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

Employer	Petitioner
For [signature]	For [signature]
For	For

Union
EXHIBIT 23

☆U.S. GPO: 2002—485-697/74368

Ozburn-Hessey Logistics, LLC *and* United Steelworkers Union. Cases 26–CA–024057, 26–CA–024065, 26–CA–024090, and 26–RC–008635

May 2, 2013

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On May 15, 2012, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party Union each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

As recounted by the judge, this is the third in a series of cases involving the Respondent's unlawful attempts to thwart its employees' efforts to secure union representation. In 2009, the Union began an organizing drive at the Respondent's Memphis, Tennessee facility, the same facility involved in this case. That organizing drive led to a representation election in March 2010, which the Union lost. The Respondent's antiunion campaign yielded two Board decisions finding that the Respondent committed numerous violations of Sections 8(a)(1) and (3) of the Act from late 2009 to early 2010.[3] In addition, the Acting General Counsel obtained an injunction under Section 10(j) of the Act ordering the Respondent to reinstate or make whole several unlawfully disciplined employees, including Carolyn Jones, the discharged employee in this case. See *Hooks v. Ozburn-Hessey Logistics*, 775 F. Supp. 2d 1029 (W.D. Tenn. 2011).

The present case involves similar alleged misconduct preceding a July 27, 2011[4] election, which the Union won by a vote of 165 to 164, with 14 challenged ballots. The judge found, and we agree, that the Respondent unlawfully confiscated union materials, conducted surveillance of protected activity,[5] interrogated employees,[6] created an impression of surveillance,[7] threatened employees, and discharged employee Carolyn Jones for engaging in protected activity. For the reasons discussed below, we also agree with the judge's findings that the Respondent committed additional violations of the Act. Finally, as discussed below, we shall direct the Regional Director for Region 26 to count six ballots challenged in the election, to certify the Union as the employees' representative if the revised tally of ballots shows that the Union received a majority of the votes, and, if not, to conduct a rerun election.

1. We also agree with the judge's finding that, at a June 28 captive-audience meeting, Director of Operations Phil Smith unlawfully invited supporters of the Union to quit. In the course of that meeting, employee Tondra Mitchell, who opposed the Union, openly asserted that if union supporters were so unhappy, then they should seek other employment. Director of Operations Smith replied, "Exactly [or "My point exactly"], that's what I'm talking about."

The judge's finding rests on settled law that an employer's statement that prounion employees should quit constitutes an implicit threat that unionization is incom-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] As described in the amended remedy section set forth below, we shall modify the judge's order to conform to our standard remedial language and to comply with our recent decision in *Latino Express*, 359 NLRB No. 44 (2012).

[3] See *Ozburn-Hessey Logistics*, 357 NLRB No. 125 (2011) (*Ozburn I); Ozburn-Hessey Logistics*, 357 NLRB No. 136 (2011) *(Ozburn II)*. The judge in *Ozburn I* upheld the union's objections and recommended that the first election be rerun, but the union withdrew its first petition before the case was decided by the Board. 357 NLRB No. 125, slip op. at fn. 1.

[4] All dates below are in 2011 unless otherwise specified.

[5] In finding that management officials conducted unlawful surveillance of union supporters while they were distributing literature in the Respondent's parking lot on May 25, we note in particular that it was highly atypical for such officials to appear in sequence and to linger in the parking lot as they did on that occasion. See, e.g., *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007).

[6] Because the finding of a violation would be cumulative and would not affect the remedy, we find it unnecessary to pass on the allegation that Senior Employee Relations Manager Shannon Miles unlawfully interrogated employee Kedric Smith, as found by the judge.

[7] The judge found that Human Resource Assistant Sara Wright's unlawful interrogation of employee Sharon Shorter—concerning whether union supporter Glenora Rayford had approached Shorter "on the floor" to discuss the Union—also created an impression of unlawful surveillance. We agree, particularly given Wright's failure to specify to Shorter how she learned of Shorter's conversation with Rayford. See, e.g., *McClain & Co.,* 358 NLRB No. 118, slip op. at 4 (2012). Moreover, the Respondent has not argued or shown that Shorter reasonably should have assumed that Wright had learned of her conversation with Rayford by some lawful means.

patible with continued employment and that union supporters will be discharged.[8] In addition, the Board has held that an employer's endorsement or ratification of an employee's antiunion conduct makes the employer itself liable for that conduct.[9] Here, Director of Operations Smith's express endorsement of Mitchell's comment that union supporters should quit effectively made that comment Smith's own, and thus chargeable to the Respondent.[10]

2. The judge found that the Respondent unlawfully issued employee Jennifer Smith a written final warning in retaliation for her prounion activity. Again, we agree with the judge. Jennifer Smith was an open supporter of the Union. On June 8, she had an argument with employee Stacey Williams, who openly opposed the Union, over the whereabouts of certain supplies. Williams later complained to the Respondent that Jennifer Smith had called him a "house nigger" during that argument. The next day, the Respondent issued Jennifer Smith a written final warning, which asserted that she had "called Stacey a 'house n****r' . . . in violation of [the Respondent's] anti-harassment and non-discrimination policy."

Applying *Wright Line*,[11] the judge found that the Acting General Counsel established that Jennifer Smith's union activity was a motivating factor in the Respondent's decision to discipline her. The judge further found that the Respondent's asserted basis for disciplining Jennifer Smith—her alleged statement to Williams—was a pretext. In this respect, the judge credited Jennifer Smith's testimony, as well as that of other employee witnesses, that she did not use a racial slur against Williams. The judge inferred from this finding, as well as the considerable evidence of the Respondent's antiunion animus, that the Respondent's discipline of Jennifer Smith was unlawful.

We agree with the judge's conclusion that the discipline was unlawful. In doing so, we emphasize the following additional circumstances that support his finding of a violation. First, the record establishes that the Respondent's purported belief that Smith used a racial slur was not reasonable. In charging Jennifer Smith with misconduct, the Respondent ignored the testimony of two witnesses who did not hear Smith use a racial slur and relied on the one witness, Shirley Milan, who supported Williams' accusation against Smith. The Respondent's reliance on Milan while ignoring the other witnesses was unreasonable: the Respondent knew that Milan had previously made a false accusation of her own against Smith.

Second, there is credited evidence in the record that the Respondent did not believe that the use of racial slurs merited discipline. The judge's findings regarding the Respondent's unlawful discharge of prounion employee Carolyn Jones establish that the Respondent was highly inconsistent in its response to racial slurs. Shortly after disciplining Jennifer Smith, the Respondent again invoked its antiharassment policy in discharging Jones. Although the judge found that Jones did use a racial epithet when confronting an antiunion employee, the judge found that the Respondent's decision to discharge Jones in part for that misconduct was "deeply inconsistent with [the Respondent's] willingness to overlook the several grossly offensive statements made by [Director of Operations] Phil Smith, a high-level supervisor, to subordinate employees." It thus appears that the Respondent was using its antiharassment policy to target union supporters, further corroborating the judge's finding of pretext in Jennifer Smith's case. Indeed, in all the circumstances presented here, even assuming the Respondent reasonably believed that Smith had used a racial epithet, we would find that the Respondent could not and did not establish that it would have disciplined her in the absence of union activity.

3. As stated, we also adopt the judge's resolutions of the 10 remaining ballot challenges.[12] We also agree, for the reasons stated by the judge, that the Respondent's election objections lack merit.[13] Further, as discussed below, we agree that certain of the Union's objections have merit and will justify overturning the election result if the Union loses its majority when the challenged ballots found eligible are counted.

In determining whether the second election result should be set aside based on the Union's objections, the judge considered some of the unlawful conduct the Re-

[8] E.g., *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006); *Paper Mart*, 319 NLRB 9, 9 (1995); *Roma Baking Co*., 263 NLRB 24, 30 (1982).

[9] See, e.g., *Airtex*, 308 NLRB 1135, 1142 (1992) (manager repeated antiunion employee's statement that union supporters would be "weeded out."); cf. *Group One Broadcasting*, 222 NLRB 993, 993, 997 (1976) (supervisor emphatically agreed with antiunion employee's statement that union supporters should be fired).

[10] Although the fact is not necessary to our finding, this was not the first time that Smith had unlawfully pressured a union supporter to quit. See *Ozburn II*, supra, 357 NLRB No. 136, slip op. at 18.

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[12] Fourteen ballots were challenged. The parties agreed at the hearing not to count four of them. Of the remaining 10 challenges, there are no exceptions to the judge's overruling of 2 (team leads Brenda Stewart and Tammy Stewart), and we agree with the judge's findings as to the remaining 8 for the reasons stated in his decision.

[13] In dismissing the Respondent's objection that Keith Hughes, a union supporter, threatened to rip an antiunion shirt off of the employee wearing it, we do not rely on the judge's finding that even if Hughes had been shown to have committed the alleged misconduct, the Respondent "mitigated" its impact by punishing Hughes.

spondent committed before June 14, when the Union filed the second election petition. In this respect, the judge relied on Board precedent establishing that, where the Board orders a rerun election because of objectionable conduct, the critical period for the rerun election commences on the date of the first election. We find it unnecessary, however, to rely on the Respondent's prepetition misconduct in this case. We rather find that the Respondent's postpetition misconduct was more than sufficient—particularly considering the one-vote margin of the election result[14]—to justify rerunning the election in the event that the Union loses its tentative majority after all eligible ballots are counted. That postpetition misconduct included the unlawful discharge of Jones, one of the strongest union supporters; the unlawful confiscation of union material on June 22; Director of Operations Phil Smith's express endorsement of a comment at the June 28 captive audience meeting that union supporters should quit; Director of Operations Smith's unlawful threat against Keith Hughes, made in public at the conclusion of the July 14 captive audience meeting, that "I'm going to get you on subordination and get you out of here"; the Respondent's threats at other captive-audience meetings that if the employees unionized it would "bargain from scratch" and employees would lose benefits; and the Respondent's distribution of antiunion T-shirts to employees in the unit. These incidents impaired the laboratory conditions necessary for a fair Board election.

In sum, we will direct the Regional Director to open and count the challenged ballots of four unlawfully discharged discriminatees (Gloria Kurtycz, Jerry Smith, Renal Dotson, and Carolyn Jones) and of two team leads (Brenda Stewart and Tammy Stewart). We find the other challenged ballots ineligible for the reasons stated by the judge. If the revised tally of ballots shows that the Union received a majority of the votes, the Regional Director will be directed to certify the Union as the employee' representative. If the Union did not receive a majority of the votes, the Regional Director will be directed to conduct a rerun election.

AMENDED REMEDY

In remedying the Respondent's unfair labor practices, the judge ordered the Respondent to permit a Board agent to read the remedial notice aloud to unit employees, at the facility, during working time, and in the presence of Senior Vice President of Operations Randall Coleman and Director of Operations Phil Smith, both of whom figured prominently in the violations found herein. Given the multiple violations committed by the Respondent in *Ozburn I, Ozburn II*, and this case, we agree with the judge that a notice reading remedy is appropriate.[15] A reading of the notice will help to assure employees that they may freely exercise their Section 7 rights in the future. We will conform this requirement, however, to our established practice of affording a respondent the option to have its managers, here Coleman and Smith, read the notice aloud to employees in the presence of a Board agent.[16]

ORDER

The National Labor Relations Board orders that the Respondent, Ozburn-Hessey Logistics, LLC ("OHL"), Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discipline and other unspecified reprisals if they engage in union or other protected concerted activities.

(b) Interrogating employees concerning their union or other protected concerted activities.

(c) Engaging in surveillance of employees' union or other protected concerted activities.

(d) Creating the impression that employee union activities are under surveillance.

(e) Confiscating union materials and related documents from employee break areas.

(f) Telling employees who support the Union to resign.

(g) Terminating, issuing final warnings, or otherwise disciplining employees for engaging in union activities.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Carolyn Jones full reinstatement to her former job or, if such job no longer exists, offer her a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Carolyn Jones whole for any loss of earnings

[14] E.g., *BCI Coca-Cola*, 339 NLRB 67, 69 (2003).

[15] See *Jason Lopez' Plant Earth Landscape*, 358 NLRB No. 46, slip op. at 1–2 (2012); *U.S. Service Industries*, 319 NLRB 231, 232 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997).

[16] E.g., *Marquez Brothers Enterprises*, 358 NLRB No. 61, slip op. at 2, 3 (2012).

In addition, in accordance with our recent decision in *Latino Express*, 359 NLRB No. 44 (2012), we shall order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. Last, the Respondent has not excepted to the judge's inclusion of a broad cease-and-desist order, which we find appropriate in any event.

and benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this Decision.

(c) Reimburse Jones an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against her.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Jones, it will be allocated to the appropriate periods.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to Carolyn Jones' unlawful discharge, and Jennifer Smith's unlawful final warning, and within 3 days thereafter notify them in writing that this has been done and that their discipline will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by OHL's authorized representative, shall be physically posted by OHL and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by OHL to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, OHL has gone out of business or closed the facility involved in these proceedings, OHL shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the facility at any time since April 11, 2011.

(h) Within 14 days after service by the Region, hold a meeting or meetings at the facility, during working hours, which will be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to the unit employees by Randall Coleman and Phil Smith in the presence of a Board agent, or, at the Respondent's option, by a Board agent in those officials' presence.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DIRECTION

IT IS DIRECTED that the Regional Director for Region 26 shall, within 14 days from the date of this Decision Direction and Order, open and count the ballots of Gloria Kurtycz, Jerry Smith, Renal Dotson, Carolyn Jones, Brenda Stewart, and Tammy Stewart. The Regional Director shall then serve on the parties a revised tally of ballots and, if the Union has been designated by a majority of the votes counted, issue a certification of representative. If the Union has not been so designated, IT IS HEREBY ORDERED that the election conducted on July 27, 2011 be, and hereby is, set aside. The Regional Director is directed to conduct a new election when, in his discretion, a fair and free election can be held.

Dated, Washington, D.C. May 2, 2013

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr,	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on

your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten you with discipline and other unspecified reprisals because you support the United Steelworkers Union (the Union) or any other union.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT confiscate union materials and related documents from employee break areas.

WE WILL NOT tell employees who support the Union to quit.

WE WILL NOT fire you, issue final warnings, or otherwise discriminate against you because you support the Union or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights described above.

WE WILL, within 14 days from the date of this Order, offer Carolyn Jones full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Carolyn Jones whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate Carolyn Jones for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Carolyn Jones and the unlawful written final warning to Jennifer Smith.

WE WILL, within 3 days thereafter, notify Carolyn Jones and Jennifer Smith in writing that this has been done and that the discharge and final warning will not be used against them in any way.

WE WILL hold a meeting or meetings at the facility, during working hours, at which this notice will be read aloud to you by Randall Coleman and Phil Smith (or the current senior vice president of operations and director of operations), in the presence of a Board agent, or by a Board agent in those officials' presence.

OZBURN-HESSEY LOGISTICS, LLC

William Hearne and *Linda Mohns, Esqs.,* for the Acting General Counsel.

Ben Bodzy and *Stephen Goodwin, Esqs. (Baker, Donelson, Bearman, Caldwell & Berkowitz, PC),* for the Respondent.

Glen Connor, Esq. (Quinn, Connor, Weaver, Davies & Rouco, LLP), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Memphis, Tennessee, over the course of 7 days during October and November, 2011.[1] On June 10, the United Steelworkers Union (the Union) filed the original charge involved herein. The resulting consolidated complaint (the complaint) alleged that Ozburn-Hessey Logistics, LLC (the Company, OHL or Respondent) repeatedly violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

In addition to the above-described charges, the Union and OHL filed several objections and challenges to a representation election, which was held on July 27. These objections and challenges were based upon the same evidentiary record as the complaint and were, as a result, heard simultaneously.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, OHL, a limited liability company, with an office located in Brentwood, Tennessee, and a major warehouse hub located in Memphis, Tennessee (the facility), has provided transportation, warehousing, and logistics services. Annually, in conducting its operations, it purchases and receives at the facility goods valued in excess of $50,000 directly from points located outside of Tennessee. Based upon the foregoing, OHL admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

OHL provides integrated supply chain management solutions; including transportation, warehousing, freight forwarding, and import and export consulting services. Its clients include various apparel, chemical, electronics, retail, automotive, food and publishing concerns. It, consequently, operates numerous distribution and warehousing centers throughout the United States, including the facility at issue herein.

B. Prior Litigation and Organizing Efforts

This hearing involves the Union's ongoing efforts to organ-

[1] All dates herein are in 2011, unless otherwise stated.

ize OHL's employees. This litigation represents the third installment in a trilogy of cases involving the parties. The earlier trials concerned many of the same issues involved herein.

1. First hearing

The first hearing, which was held in early 2010, involved numerous allegations that OHL violated Section 8(a)(1) and (3). In this case, the Administrative Law Judge, and subsequently the Board, found that OHL repeatedly violated the Act. (ALJ Exh. 1); *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136 (2011) (*Ozburn* I).

2. First election

On March 16, 2010, the Board conducted an election at the facility, which the Union lost by a wide margin. (ALJ Exh. 2.) The Union subsequently filed objections to the election, and asserted that OHL's unlawful actions tainted the election. These objections were sustained by the Administrative Law Judge, who ordered a rerun election. (Id.).

3. Second hearing

The second hearing, which occurred in late 2010, involved voluminous allegations that OHL again violated Section 8(a)(1) and (3). (ALJ Exh. 2.) In this case, the Administrative Law Judge, and subsequently the Board, found that OHL repetitively violated the Act. *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 125 (2011) (*Ozburn* II).[2]

4. The 10(j) Injunction

In light of the seriousness and magnitude of the violations involved in the first two hearings, Region 26 of the Board filed a Petition for Temporary Injunctive Relief in the United States District Court for the Western District of Tennessee on August 10, 2010. (GC Exh. 4.) On April 5, a Petition for Temporary Injunctive Relief (the Injunction) was granted. (Id.)

C. April 11—Confiscating Union Materials

Sandra Hayes, a former employee, testified that, on April 11, she, Glenora Rayford and Helen Herron placed copies of the Injunction in a break area.[3] She related that she later observed Supervisor Eric Nelson remove the Injunctions from the break area. She recollected that she responded by telephoning Union Organizer Ben Brandon, who directed her to place additional copies of the Injunction in the break area, which she did. She indicated that, thereafter, she saw Director of Operations Phil Smith discard the additional Injunctions. She averred that their actions were unusual, inasmuch as supervisors typically do not remove waste from break areas. She added that break areas are daily cleaned by a janitor, who typically stacks and leaves behind written materials for several weeks at a time.

Rayford corroborated Hayes' testimony. She said that she observed Supervisor Nelson holding wadded Injunctions. She added that, when she asked Supervisor Randy Phillips why OHL removed the Injunctions from the break area, he queried, "that trash?" She noted that she never previously saw supervisors cleaning the break area, and estimated that reading material is normally left in the break area for multiple weeks at a time. Herron corroborated Rayford's and Hayes' accounts.

Supervisor Nelson, who has since resigned, testified that literature is generally left in the break area for several days. He denied intentionally disposing of the Injunctions.

Philip Smith testified that, even though OHL employs janitors, he's fastidious about break area tidiness, and maintains a steady practice of cleaning away debris, including "empty plates, food containers, general trash, papers, magazines, Avon books [and] anything that's laying there." (Tr. 1466.) However, he steadfastly denied discarding the Injunctions.

Inasmuch as Hayes, Rayford, and Herron indicated that they saw Smith and Nelson remove the Injunctions from the break area, and Smith and Nelson denied such activity, I must make a credibility determination. For several reasons, I credit Hayes, Rayford, and Herron. First, Rayford and Herron were straightforward and plausible witnesses; they were consistent and portrayed themselves as truthful witnesses, who wanted to aid the proceeding. Second, Nelson was vague. Lastly, Phil Smith was a generally unbelievable witness, who although straightforward on direct, seemed to change his demeanor on cross, and become vastly less cooperative. He seemed to be more interested in advancing OHL's interests than being forthright. His "Mr. Clean" defense was also somewhat preposterous; it's simply improbable that a high-level manager would spend a regular part of his workday cleaning food waste and other garbage left behind by his subordinates. It is even less plausible that he would have maintained this alleged penchant for tidiness, after this practice was previously found unlawful in an earlier litigation.[4] See *Ozburn I*, supra, 357 NLRB No. 136, slip op. at 7–8. I find it probable that he was disappointed by the Injunction, saw its distribution as beneficial to the Union, and took steps to derail its dissemination.

D. April 29—Meeting in the Hewlett Packard Department

Anita Wells testified that, on April 29, she attended a captive audience meeting in the Hewlett Packard department, which was attended by 50 employees. She recollected Keith Hughes, an open union supporter, asking Senior Vice President of Operations Randall Coleman whether the Union was obligated to represent employees, who did not pay dues. She indicated that Coleman refused to answer the question and became frustrated, when Hughes refused to drop the matter. She stated that Phil Smith then walked over to Hughes and stood closely behind him for 15 minutes, in what appeared to an effort to intimidate him into silence.

Hughes testified that, when Coleman told employees that the election would occur earlier if they stopped filing charges, he queried why they should drop legitimate charges. He stated that Coleman replied that it was "his floor," and told him to be

[2] On July 1, the Board approved the Union's request to withdraw its petition in Case 26–RC–8596, i.e. the first election petition, which, thus, rendered any connected objections moot. The Board did not, as a result, address the merits of setting aside the first election. See *Ozburn II*, 357 NLRB No. 125, slip op. at 1, fn. 1.

[3] "USW Organizing Committee" was written on each copy of the Injunction.

[4] Phil Smith, ironically, confiscated the very same Injunctions that ordered him to stop "confiscating pro-union literature from break areas." See (GC Exh. 4).

quiet. He stated that Phil Smith then approached him and hovered over him for about 15 minutes. He added that, when the meeting ended, Phil Smith threatened, "he thinks he's something special; I got something for him."

Phil Smith testified that Hughes rudely interrupted the presentation, and even mumbled and made odd noises. He acknowledged approaching Hughes, in order to confirm that he was the actual heckler, and estimated that he stood behind him at a 10 foot distance for 10 minutes. He denied uttering, "I got something special for him."

Because Hughes testified that Smith hovered over and threatened him, in response to his queries about Union issues, and Smith denied such activity, I must make a credibility determination. I credit Hughes over Phil Smith. First, as noted, Phil Smith's demeanor was less than credible. Second, it is likely that Phil Smith was concerned that Hughes was undermining the captive audience meeting, and silenced him. Third, Hughes was a refreshingly forthright and well-spoken witness, who seemed to be committed to providing truthful testimony. Lastly, Hughes' testimony was corroborated by Wells, who was also credible.

E. May 11—Human Resources Department Meeting

Sharon Shorter, an open union supporter, testified that, before the July 27 election, she was summoned to Human Resource Assistant Sara Wright's office. She stated that Wright asked her about changing a doctor's appointment. She explained that she had been diagnosed with high blood pressure, and recalled Wright asking whether someone was causing her stress. She related that she forthrightly answered that she was upset about being underpaid, and believed that such frustration was causing her blood pressure issues. She said that Wright failed to accept her explanation, and followed up by asking whether someone at work was pressuring her about the Union. She indicated that Wright continued this course, and identified Rayford, a union supporter, as the possible source of her stress:

> She said, . . . "do you all talk about the Union?" I said, ". . . we have talked about the Union, but, it's during break time; we don't talk about it during work time." And then I asked her, ". . . are you concerned about my blood pressure or are you concerned about . . . Rayford coming to talk to me about the Union?" And she said, "well, oh no Sharon, it's not like that. I am concerned about your blood pressure." Then I told her, "you know [now]," [and] got up and left. And she . . . [hasn't] called me back since [to ask] about my blood pressure. (Tr. 785.)

Wright denied talking to Shorter about Rayford. She averred that their conversation was limited to her concerns about Rayford's health, and Shorter's grievance about her wages.

Inasmuch as Shorter testified that Wright questioned her about Rayford's union activities, and Wright denied such action, I must make a credibility determination. I credit Shorter over Wright. Shorter provided detailed and honest testimony; she had a vivid recollection of their discussion. I find it implausible that she would have concocted a story, which involved Wright using her blood pressure problems as a mechanism to ask her about the Union, unless it actually happened. Her apparent irritation over this exchange lent credence to her testimony. Wright, on the other hand, appeared less credible, and only provided generalized testimony about their discussion.

F. May 25—Handbilling

Carolyn Jones testified that, on May 25, she and several coworkers passed out handbills and solicited coworkers to sign authorization cards in the Hewlett Packard parking lot in the late afternoon. See (GC Exh. 6). She recollected that, within minutes of beginning, she observed John McNamee, director of risk management, park his vehicle, exit, and then stop and linger for 7 minutes, while staring at the ground and feigning that he had lost something.

Renal Dotson testified that he saw McNamee standing a few feet away from his leafleting activity, and alternate between peering at the ground and leafletters for 4 minutes, before departing. He said that, within minutes of his departure, Coleman: exited the Hewlett Packard building; walked to his parked car and sat in it for several minutes; slowly drove to another spot; remained in his car a few more minutes; exited his car; stared at the ground outside of his car for 5 more minutes; and then, finally, reentered the building. Jerry Smith essentially corroborated Jones' and Dotson's accounts.

McNamee testified that he is responsible for security at OHL's various sites, including the Memphis facility. He said that he visits Memphis 12 times per year and was there on May 25. He stated that he parked in the Hewlett Packard parking lot, walked around his car while making a call to his spouse, and remained for several minutes. He denied watching employees' union activities, and initially even denied noticing them. (Tr. 799.) He then agreed, on cross-examination, that he saw some employees, but, denied knowing that they were Union organizers. (Tr. 806.) He then changed his testimony again, and agreed that they were likely organizers. (Tr. 807.)

Coleman testified that he has observed frequent handbilling at the facility. He denied, however, observing such handbilling on May 25.

I credit Jones, Dotson, and Smith over McNamee and Coleman. First, Dotson and Smith were extremely credible, helpful and straightforward witnesses. Second, their accounts were corroborated by Jones, who provided clear testimony. Third, McNamee was implausible and inconsistent. He first said that he never noticed the leafletters, which was implausible, given that he is a security official who would likely notice such activities. He then inconsistently recanted his testimony and said that he did observe them, but, denied that they were Union organizers. He then contradicted himself again and said that they were organizers. Lastly, Coleman's recall was poor.

G. May 26—Threat Against Carolyn Jones

Carolyn Jones testified that, on May 26, in a break area, she and her coworkers were discussing potential union dues. She asserted that their discussion succeeded a captive audience meeting, where OHL exaggerated the cost of union dues. She related that she told her coworkers that President Barrack Obama supported their right to unionize, and that, if he endorsed this right, it was worthy of their consideration. She recalled that Phil Smith then appeared, stood behind her, and

said:

> [I] just had two . . . employees . . . [say] they were called stupid. [Y]ou all are the ones that are stupid because you're trying to get a Union. (Tr. 77.)

She recalled asking him whether he was referring to her, and him answering, "if the shoe fits, wear it." She recalled denying that she had called anyone stupid, but, said that it was "stupid" for employees to not want a Union. She related that he answered that wanting a Union was "stupid." She indicated that she then tried to end their discussion by asking, "don't you have a meeting to go to?" She noted that he became irate, and warned, "you better watch your back!"

Annie Ingram, Troy Hughlett, James Bailey, and Kedric Smith corroborated Carolyn Jones' account. They observed the fracas, including Phil Smith saying that employees were "stupid," and telling Jones to "watch her back." See also (GC Exh 10; tr. 1056–1057). See (GC Exhs. 22, 58) (GC Exh. 17).

Phil Smith testified that employees complained to him that Carolyn Jones had proclaimed that African American people, who did not support unionizing, were stupid. He stated that he solely visited the break room to tell employees that OHL did not think that they were stupid. He indicated that, at some point, Jones told him that he needed to go back to work, and that he told her that she was out of line. He denied telling her to watch her back.

Given that Carolyn Jones indicated that Phil Smith threatened that she needed to "watch her back," and Phil Smith denied this statement, I must make a credibility determination, in order to resolve this dispute. I credit Jones over Smith. First, I found her testimony on this point to be credible, and the witness statement, which was created almost contemporaneously with the incident, was consistent with her testimony. Second, her testimony was corroborated by Hughlett, Ingram, Kedric Smith, and Bailey. Third, as stated, Smith was a less than credible witness. Lastly, I note that, in a break area filled with people, it is conspicuously implausible that OHL was unable to find a single witness to corroborate Phil Smith's account.

H. June 3 Interview of Kedric Smith

Shannon Miles, senior employee relations manager, testified that, on June 3, she interviewed Kedric Smith. As part of the interview, she asked:

> Has C.J. tried to solicit you for the Union while you were working on the floor (on the clock)? (GC Exh. 5 at 6.)

I. June 9 Written Warning to Jennifer Smith

1. Final warning notice

On June 9, the Company issued Jennifer Smith a final warning, which provided:

> On 6/8/2011, Stacey Williams and Jennifer Smith got into a verbal altercation wherein Jennifer called Stacey a "house n****r," . . . . This is in violation of OHL's anti-harassment and non-discrimination policy. (R. Exh. 2.)

2. Knowledge of Smith's union activities

Jennifer Smith distributed union handbills and literature, and solicited coworkers to support the Union. She testified for the Union at the prior unfair labor practice hearings. She estimated that she collected 50 signed union authorization cards. She recollected wearing union hats and shirts to work. OHL admits knowing about these activities. (GC Exh. 36; Tr. 475.)

3. Events leading to the final warning

Jennifer Smith testified that, on June 8, coworker Stacey Williams became childishly upset over several missing red pens. She indicated that, before the ruckus, she retrieved a box of red pens from the supply area. She reported that, subsequently, Williams became irate that the red pen supply had become depleted. She said that she declined to acknowledge his demand for the pen pilferer to come forward, in order to avoid a possible clash with an unstable coworker. She stated that, at some point, Williams, who is also African American, stated, "I guess I have to call the white people for you to give me those pens back." (Tr. 480.) She stated that Williams, who is vehemently antiunion, later accused her of calling him a "house nigger," in response to his tirade, which she denied. See (GC Exh. 37.)

Sheila Childress, who witnessed the altercation, testified that she did not hear Smith call Williams a "house nigger." See (GC Exh. 40). She estimated that she stood about 30 feet from the fracas. Jerry Smith, who witnessed the incident, denied hearing Jennifer Smith use profanity. He averred that he would have heard such a comment, if it were said.

Williams testified that he was looking for a red pen and asked his coworkers for their aid. He said that, when he was met with silence, he enlisted Brad, his supervisor, to help him. He said that, when Brad arrived, Jennifer Smith relinquished several pens. He recalled her stating, "you're always starting stuff," and "[you're] nothing but a house nigger," after Brad left.

Shirley Milan claimed that she witnessed Smith call Williams a "house nigger." She averred that she stood 4 feet away, when the comment was made. See also (R. Exh. 11). She acknowledged, on cross-examination, that she previously accused Smith of threatening her with a knife, but, that OHL found that this accusation was unfounded. (Tr. 938.) She admitted that she does not get along with Smith, whom she finds controlling.

Because Jennifer Smith, Childress and Jerry Smith denied that Jennifer Smith called Williams a "house nigger," and Williams and Milan provided opposite testimony, I must make a credibility determination. I credit Jennifer Smith's denial. First, I found her to be an honest witness, who was cooperative during all phases of her examination. Second, her testimony was consistent with Childress' and Jerry Smith's credible accounts. Third, Williams was a confusing, hostile, and argumentative witness, whose testimony was disjointed. Finally, I found Milan, who corroborated Williams' account to be a biased witness, who previously made an unsubstantiated claim that Smith threatened her with a knife, and who also conceded that she dislikes Smith.

J. June 14—Petition for Second Election

On June 14, in Case 26–RC–8635, the Union filed a petition with the Board, which sought a new election at the facility. (U. Exh. 14.) The petition covered 300 employees. (Id.)

K. June 14—Carolyn Jones' Termination

1. Termination letter

On June 14, the *same date* that the Union's election petition was filed, Jones, a lead Union organizer, was fired. Her termination letter provided:

> Effective immediately, your employment with OHL is terminated based on your violations of the OHL policies listed below. Each of these violations independently justify your termination.
>
> Violation of the company's conduct guidelines regarding failure to cooperate with an internal investigation, including: failure to be forthright, open or truthful; withholding information or evidence concerning matters under review or investigation; fabricating information or evidence or conspiring to do so.
>
> Violation of the company's Anti-Harassment policy through verbal conduct that denigrates or shows hostility or aversion toward an individual due to race. (GC Exh. 14.)

Senior Employee Relations Manager Miles testified that she made the decision to fire Jones. She stated that, although she initially investigated whether Phil Smith had threatened her, she concluded that he was innocent, and determined that Jones had asked employees to sign a blank sheet of paper and then fraudulently filled in a statement about the threat above their signatures. She added that, during the course of this investigation, she discovered that Jones had repeatedly called Lee Smith a "UT," an acronym for "Uncle Tom." She stated that these actions violated OHL's policies. She claimed that she decided to fire Jones on June 13, the day *before* the Union's petition was filed.

I discredit Miles' testimony; her demeanor was cagey and untruthful. She was an uncooperative witness, who often sparred during cross-examination. Her testimony was marked by extensive pauses, when faced with difficult questions, and she often failed to answer key questions. I do not, as a result, credit her contention that she was unaware that the Union had filed its petition, when she decided to fire Jones. Moreover, as will be discussed under my *Wright Line* analysis, OHL's discharge rationale was pretextual.

2. OHL's knowledge of Jones' union activities

OHL conceded that it knew that Carolyn Jones was an active Union organizer. (Tr. 58; GC Exhs. 7–9.) She handbilled, solicited coworkers and gathered 80 authorization cards.

3. Discharge Reason #1—Fabricating Evidence

OHL accused Jones of falsifying a statement, which described Phil Smith's May 26 threat. It alleged that she fabricated evidence by: (1) asking coworkers to sign a blank statement; (2) then fraudulently placing a statement before their names; and (3) finally, submitting the statement to OHL, in order to instigate Phil Smith's discipline.

Carolyn Jones credibly testified that, after Phil Smith told her to "watch her back," she prepared a witness statement and asked her coworkers to sign it. She indicated that the statement was signed by Troy Hughlett, Annie Ingram, Kedric Smith, and James Bailey, and, thereafter, was submitted to OHL. See (GC Exhs. 10, 12–13, 57).

Ingram testified that she signed Jones' statement, which accurately described the incident. She stated, however, that she was later interviewed by Regional Human Resources Director Young about the incident, who gave her a blank piece of paper to sign. She stated that Young subsequently inserted text in front of her signature to create a fraudulent statement against Jones, which claimed that Jones gave her a blank statement to sign. See (GC Exh 23). I credit her testimony on these points.

Hughlett testified that, although he did not carefully review Jones' statement, it had text, beyond signatures. He said that he trusted her account and did not need to carefully read it. He acknowledged, however, that he subsequently signed another statement, which indicated that he signed a blank statement for Jones. He disavowed the truth of this second statement and explained that he felt pressured into signing it after a lengthy examination by OHL, and solely executed it in order to end his interrogation. See (GC Exh. 18). I credit his testimony on these matters.

Bailey stated that Jones subsequently approached him and asked him to sign a statement, which he did. See also (GC Exhs. 19–20). He indicated, however, that, on June 6, Young summoned him to her office, and handed him a prepared statement for his signature, which he signed without close inspection. See (GC Exh 21). The June 6 statement provided:

> James states that at the time he signed the paper was blank. He [has] never seen or read Carolyn's statement.

(Id.). He indicated that he signed the June 6 statement under duress, which was prompted by OHL's ongoing interrogations. I credit his testimony on these points.

Kedric Smith stated that, after the incident, Jones gave him a piece of paper that just had names on it, and asked him to sign it. When asked, however, "was there anything written above the signatures?" he responded;

> I couldn't tell you that because I – the only thing I focused on was the names. I didn't know that there was an actual statement behind it for the simple fact that I had just seen the names and just thought that it was a list of witnesses. So I didn't know that it was a statement on it.

(Tr. 1054.) I found his recall on these issues to be poor, and afforded his testimony little weight.

In crediting Ingram's, Hughlett's, and Bailey's testimonies, I rely upon several factors. First, their demeanors were truthful. Second, it is improbable that they would collectively invent a tale that OHL fabricated evidence against Carolyn Jones, and then risk its wrath by testifying against it, unless their accounts were truthful. At the time of the hearing, they had neither been disciplined, nor had they been identified as strong union advocates. They, as a result, had everything to lose by providing this testimony against OHL, and very little to gain. Their willingness to accept this significant risk, without any obvious evidence of benefit, enhances their credibility. Third, it is plausible that, after lengthy interrogations by the human resources department about a controversial matter involving the Union, employees could easily be coerced into signing a statement of their employer's choosing. Lastly, their accounts are consistent

with the actions of an entity that has already expended tremendous resources to combat the Union's organizing drive.

4. Discharge Reason #2—UT Comments

a. UT Comments to Lee Smith

OHL accused Jones, who is African American, of calling Lee Smith, an African American coworker, a "UT," i.e. an "Uncle Tom."[5] OHL's Anti-Harassment Policy prohibits, inter alia, harassment based upon race, color and other protected characteristics. (R. Exh. 6.) Under the policy, harassment includes:

- Epithets, slurs or negative stereotyping;
- Threatening intimidating or hostiles acts;
- Denigrating jokes . . . .

(Id.). The OHL Handbook sets forth a progressive disciplinary procedure, which includes the following successive punishments: verbal warning; written reprimand; suspension; and termination. (GC Exh. 35.) The Handbook further provides that termination is warranted when:

> In cases in which . . . [progressive discipline] has failed to correct unacceptable behavior or performance, or in which the performance issue is so severe as to make continued employment with OHL undesirable . . . .

(Id.).

Jones denied calling Lee Smith a "UT." See also (GC Exhs. 11, 13). She did acknowledge, however, that the term is periodically used at the facility amongst African American employees, and that she has said it before. Dotson testified that he never witnessed Jones call Lee Smith a "UT." See (GC Exhs. 24, 59).

Lee Smith testified that Carolyn Jones called him a "UT" several times during the spring of 2011, before he asked her on May 17 what she meant. He said that, when she answered that it meant "Uncle Tom," he was deeply hurt. He stated that he then reported her actions to human resources. He added that she began calling him a "UT," after he voiced his Union opposition.

Jennifer Sims, another employee, recalled Lee Smith describing to her what occurred, when he asked Carolyn Jones what "UT" meant. She recollected this dialogue:

> He said that as he [left] . . ., Carolyn was already outside and she called him UT again. And this time he turned and asked her . . . what it meant. And she called him an Uncle Tom. And he got upset. He was like what? And so he got ready to walk away, and he turned back to her, and mentioned he wasn't an Uncle Tom, his faith isn't in a company, his faith is in God. . . . And he stormed away and told her . . . we have nothing else to discuss . . . . And he got in his truck and left. (Tr. 832.)

Because Lee Smith testified that Carolyn Jones called him a "UT," and Jones denied this statement, I must make a credibility determination. I credit Lee Smith; he was forthright and his offense appeared genuine and lasting. It is implausible that he would have concocted a story about this incident. Jones' admitted willingness to use this racial epithet against others suggests that she likely used this epithet against Lee Smith, given his open opposition to the Union.

b. Other Sexually and Racially-Oriented Comments

(I) COMPARABLE CONDUCT RECEIVING DISCIPLINE

OHL's records show that it meted out the following discipline for comparable offenses:

Employee	*Date*	*Incident*	*Discipline*
A. Burgess	1/25/2006	Usage of profanity against a supervisor	Verbal Discussion
B. Newberry	1/21/2010	Drew picture of coworker calling her "snitch #1"	Final Warning
S. Northington	4/12/2010	Called a coworker a "silly bitch"	Written Warning
K. Hughes	7/2/2010	Inappropriate language to a coworker.	Final Warning
H. Quarles	7/2/2010	Inappropriate language to a coworker.	Final Warning
R. Williams	9/1/2010	Sexual harassment of a subordinate	Written Perf. Counseling
A. Burgess	9/27/2010	Profanity at coworker, while pointing pen at him.	Discharge
K. Hughes	11/8/2010	Usage of profanity to coworkers	Three-day suspension
J. Smith	6/9/2011	Calling a coworker a "house nigger"	Final Warning
K. Hughes	8/26/2011	Told coworker that he would "rip her shirt off."	Final Warning

(GC Exhs. 25, 27, 30, 77–79; R. Exh. 2, 21.)

(II) COMPARABLE CONDUCT NOT RECEIVING DISCIPLINE[6]

Jill McNeal, an African American employee, testified that, Phil Smith, a Caucasian employee, referred to her as a "monkey on a stick," in front of Supervisor Steele. She related that this comment prompted significant laughter. She indicated that she did not report this racial slur to upper management because she thought that it would be ignored. Rayford stated that she, and most of her department, witnessed the incident. Phil Smith and Steele denied the incident.

Carolyn Jones testified that, in 2009, at a group meeting, Phil Smith called James Griffin a "faggot ass." Undenise Martin, another employee, corroborated this testimony. Phil Smith denied calling Griffin this name.

I discredit Smith's denials, and find that he used the epithets, "monkey on a stick" and "faggot ass." I found the testimonies of McNeal, Rayford, Jones, and Martin to be reliable.

[5] It is undisputed that the phrase "Uncle Tom" is a racial epithet for a person, who is excessively subservient to perceived authority figures, and often is used to negatively describe African American persons, who are believed to be behaving subserviently to Caucasian people.

[6] Carolyn Jones said that 95 percent of the workforce is African American and the usage of racial slurs, e.g. nigger, is commonplace.

L. June 22—Confiscation of Union Materials

Rayford testified that, on June 22, she placed Union organizing literature in the break area. She indicated that she later observed Operations Supervisor Alfreda Owens confiscating this literature.[7] She stated that Owens solely confiscated the Union materials and left the remaining literature (e.g. Avon catalogs and newspapers) untouched. Herron corroborated her testimony. I credit Rayford's and Herron's testimony; I found each to be credible.

M. June 28—Captive Audience Meeting

Jennifer Smith testified that, on June 28, OHL conducted another captive audience meeting, where Karen White, Coleman, Phil Smith, and Young addressed 40 employees. She stated that White advocated against unionizing. She related that Coleman told employees that the Union was solely interested in their dues and would prompt a strike. She recalled that Tondra Mitchell commented that, if the Union supporters were so unhappy, they should seek other employment. She stated that Phil Smith replied, "exactly, that's what I'm talking about," and that Young fell over laughing. Childress and Jerry Smith corroborated her account.

Phil Smith stated that, when Mitchell asked whether union supporters should resign, he replied that, "I can't answer that question." He denied encouraging anyone to resign.

Mitchell testified that, when she asked Phil Smith that, if employees were so unhappy, why don't they just leave, he solely responded that he could not answer the question. She did not recall Young laughing. Coleman testified that he recalled Mitchell's question, but, recollected Phil Smith responding that she should ask the employees. He added that he did not recall Phil Smith saying, "my point exactly." He indicated that he thought that he would have remembered such a comment, if it was said. White recalled Mitchell's query, but, stated that Phil Smith told her to ask employees that question. She denied that he responded, "my point exactly." Young testified that she generally recalled Mitchell's statement, but, did not remember any manager's response, and denied falling down laughing.

I credit Jennifer Smith, Childress, and Jerry Smith, who were highly credible, over OHL's witnesses. As stated, I found Phil Smith and Coleman to be less than credible.

N. July 14—Captive Audience Meeting

Hughes testified that, on July 14, he attended a captive audience meeting in the Hewlett Packard break area, which was conducted by White and Phil Smith. He recalled that this meeting focused on the salaries of the Union's staff. He added that, when he asked White what her salary was, she became irate and called him a "rabble rouser," and Phil Smith told him to "shut up." He recollected that, when he asked Phil Smith what he was going to do, Smith answered, "I'm going to get you on subordination and get you out of here." He averred that he then told Smith that it was an open meeting and threats were inappropriate.

Phil Smith testified that, during White's presentation, Hughes posed an unending string of questions and intentionally interrupted her. He stated that, when he politely asked him to stop, Hughes asked him whether he was going to take him outside. He indicated that he then replied that he would address the matter through OHL's disciplinary system. I credit Hughes, a highly credible witness, over Phil Smith, a witness with diminished credibility.

III. ANALYSIS

A. Independent 8(a)(1) Allegations

1. Interrogation[8]

OHL unlawfully interrogated employees. On May 11, Wright summoned Shorter to her office and asked whether Rayford was talking to her about the Union during working time. On June 3, Senior Employee Relations Manager Miles asked Kedric Smith, an employee, whether union advocate Carolyn Jones solicited him to support the Union during working time.

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
> (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at 940.

For several reasons, I find that Wright and Miles committed unlawful interrogations. First, there is an extensive history of Union hostility, as demonstrated by the instant case, *Ozburn I* and *Ozburn II*. Second, both Wright and Miles appeared to be asking questions, in order to assess whether OHL could discipline union advocates Rayford and Carolyn Jones for matters connected to their union activities. Third, both Miles and Wright are significantly higher in the corporate hierarchy than the interrogated employees. Lastly, the questioning took place

[7] OHL's counsel credibly explained that Owens was subsequently fired, and that he was unable to subpoena her to attend hearing. (Tr. 1349.) He contended, as a result, that he was unable to rebut this testimony.

[8] These allegations are listed under pars. 9(a), 11, and 14 of the complaint.

in the human resource department's offices, as opposed to the warehouse floor, which likely amplified the intimidation level.

2. Surveillance[9]

OHL engaged in unlawful surveillance. On May 25, Coleman and McNamee observed Carolyn Jones, Dotson, and Jerry Smith distribute union organizing materials to employees.

An employer violates Section 8(a)(1), when it "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness, include the "duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id.

Both Coleman and McNamee observed union organizers distribute leaflets to employees on May 25. Their observation lasted several minutes, took place from a close vantage point, was out of the ordinary,[10] and likely dissuaded several employees from interacting with the Union's organizers, out of fear of reprisal. Such activity violated the Act.

3. Impression of surveillance[11]

OHL unlawfully created the impression that employees' union activities were under surveillance. On May 11, Wright told Shorter that she knew that Rayford was soliciting her on behalf of the Union.

An employer creates an unlawful impression of surveillance, when reasonable employees would assume that their union activities have been monitored. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009). Where an employer tells employees that it knows about their union activities but fails to cite its information source, Section 8(a)(1) is violated because employees are left to speculate about how such information was obtained and assume that surveillance occurred. (Id. at 1296.) If an employer tells employees that it learned of their union activities from a specific employee, such comments are generally lawful, and do not lead one to assume that surveillance has occurred. *Park 'N Fly Inc.*, 349 NLRB 132, 133 (2007).

Wright commented that OHL knew that Shorter and Rayford were discussing union affairs at the facility, but, failed to identify her informant. This statement, as a result, left Shorter to speculate about OHL's information source and reasonably conclude that it was monitoring their discussions; and, accordingly, created an unlawful impression of surveillance.

4. Confiscation of union materials[12]

OHL violated the Act, when it confiscated union materials. Phil Smith, Nelson, and Owens confiscated union materials from break areas. Employees generally have the Section 7 right to possess union materials at work, absent evidence that their employer restricts possession of other personal items, or that possession of union materials interferes with production or discipline. *Brooklyn Hospital-Caledonian Hospital*, 302 NLRB 785, 785 fn. 3 (1991). An employer, thus, violates the Act by confiscating union literature and materials from employees. *Ozburn I*, supra; *Brooklyn Hospital-Caledonian Hospital*, supra. Given that there is no evidence that OHL restricted the possession of other personal items, or that the union materials at issue interfered with production or discipline, OHL's repeated confiscation was unlawful.

5. Telling union supporters to resign[13]

OHL violated the Act, when it told union supporters to resign. At a June 28 meeting, an employee posed the question that, if union supporters were so unhappy, why didn't they just quit? When Phil Smith replied, "my point exactly," he invited Union supporters to quit, which was unlawful. See, e.g., *Solvay Ironworks*, 341 NLRB 208 (2004).

6. Threats[14]

OHL violated the Act, when Phil Smith threatened employees. On April 29, he threatened Hughes, when he hovered over him for 15 minutes, in response to his questions about union issues, and warned that, "I got something for him." See *F. W. Woolworth Co.,* 251 NLRB 1111, 1112–1113 (1980) (conduct is protected, ever where employee repeatedly and loudly insists upon speaking at a captive audience meeting, in contravention of a direct order to cease and desist). On May 26, he threatened Carolyn Jones, when he responded to her commentary about a captive audience meeting by stating that, "she better watch her back." See *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462–463 (1995); *Trover Clinic*, 280 NLRB 6 fn. 1 (1986) ("keep a low profile" and "be quiet about it"); *Union National Bank*, 276 NLRB 84, 88 (1985) ("watch yourself"). On July 14, at a captive audience meeting, Hughes responded to a presentation about union staff salaries, by asking White her salary, which prompted Phil Smith to threaten disciplinary action. See *F. W. Woolworth*, supra.

B. 8(a)(3) Allegations[15]

OHL violated Section 8(a)(3), by issuing a final warning to Jennifer Smith and firing Carolyn Jones. The framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is the appropriate standard:

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the [discharge]. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the

[9] This allegation is listed under pars. 10 and 14 of the complaint.

[10] It was more than coincidental that McNamee appeared just as the leafleting began, and Coleman appeared immediately after McNamee left.

[11] This allegation is listed under pars. 9(b) and 14 of the complaint.

[12] These allegations are listed under pars. 7(a), 8, 12, and 14 of the complaint.

[13] This allegation is listed under pars. 7(d) and 14 of the complaint.

[14] These allegations are listed under pars. 7(b), (c), and (e), and 14 of the complaint.

[15] These allegations are listed under pars. 13 and 15 of the complaint.

> absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065 (2007) (citations omitted).

To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000). If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

1. Jennifer Smith's final warning

OHL violated the Act, when it issued Jennifer Smith a final warning. The record demonstrates that she engaged in substantial Union activity,[16] which was known to OHL.[17] The record reveals strong evidence of animus, which includes the meritorious interrogation, surveillance, impression of surveillance, threat and confiscation of union literature allegations. An inference of animus can also be gleaned from the false rationale that OHL proffered for Smith's final warning, i.e. that she called Stacey Williams a "house nigger."[18] See *Electronic Data Systems Corp.*, 305 NLRB 219 (1991) (false discharge reasons demonstrate animus).

I find, therefore, that counsel for the Acting General Counsel has proven that: Jennifer Smith engaged in union activity; OHL was aware of such activity; and union animus was a "substantial or motivating factor" behind the final warning. Accordingly, he has met his initial burden of persuasion under *Wright Line*.

Given that I previously found that Jennifer Smith did not commit workplace crime that gave rise to her final written warning (i.e. calling Stacey Williams the alleged epithet), as well as my consideration of the many factors that led me to find animus and knowledge, I conclude that OHL's proffered reason was a mere pretext and that antiunion animus motivated its actions. Accordingly, no further analysis of its defenses is necessary for, as the Board stated in *Rood Trucking Co.*, 342 NLRB 895, 898 (2004):

> A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where "the evidence establishes that the reasons given for the Respondent's actions are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

2. Carolyn Jones' discharge

OHL violated the Act, when it fired Carolyn Jones. The record demonstrates that she engaged in substantial union activity,[19] which was known to OHL.[20] There is also extensive evidence of animus, which includes the 8(a)(1) violations found herein, and Jennifer Smith's unlawful discipline. I also note that animus can be gleaned from the close timing between Jones' discharge and the filing of the Union's election petition, which both occurred on the same date. See *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993) (suspicious timing supports an inference of animus).

Thus, I find that counsel for the Acting General Counsel has proven that: Carolyn Jones engaged in union activity; OHL knew of such activity; and union animus was a "substantial or motivating factor" behind her firing. Accordingly, he has met his initial burden of persuasion under *Wright Line*, and I will now consider the alleged discharge reasons.

OHL's asserted discharge reasons are pretextual. It advanced 2 independent reasons, in support of Jones' discharge: fabrication of evidence; and violation of its racial harassment policy.

OHL's allegation that Carolyn Jones fabricated evidence connected to the altercation between her and Phil Smith on May 26 was pretextual. As discussed, it accused Carolyn Jones of fabricating a witness statement, which alleged that Phil Smith threatened her to "watch her back." First, the majority of the witnesses stated that they signed a witness statement that had text above their signatures, although they admittedly had a poor recall of the statement's contents; this deeply undercuts the fabrication allegation. These witnesses also credibly stated that OHL was so zealous in its pursuit of Carolyn Jones that it actually coerced them into signing false statements. Second, Phil Smith threatened Carolyn Jones in the manner described by her statement. Third, the statement does not appear to have been created after the fact, given that the signatures are located immediately after the text and about a third of the way down the page. I find it implausible that Jones created an after-the-fact statement, and correctly predicted where witness signatures would ultimately fit. Lastly, if OHL were genuinely motivated to address concerns about false statements, it would have also

[16] As noted, she distributed union handbills and literature, openly encouraged coworkers to support the Union, previously testified on behalf of the Union, collected 50 signed union authorization cards, and wore union stickers, buttons, hats, and shirts.

[17] See (GC Exh. 36); Tr. 475.

[18] As stated, I fully credit her denial of this allegation.

[19] Since the inception of the Union's organizing drive, Jones has distributed handbills and union organizing materials, solicited coworkers to sign authorizations cards, attended union meetings, spoke on behalf of the Union at OHL's captive audience meetings, and obtained roughly 80 signed union authorization cards.

[20] See (GC Exhs. 7–9); Tr. 58.

disciplined Phil Smith, who falsely denied threatening Carolyn Jones, and committed a more serious transgression.[21] Based upon the foregoing, I find that this discharge reason was pretextual.

OHL's assertion that Carolyn Jones' "UT" comments served as an independent basis for her termination is also pretextual. Although I find that Jones made the comments at issue, OHL addressed this offense much more severely than prior similar offenses; such disparate treatment demonstrates pretext. Specifically, in the 10 prior disciplinary actions involving profanity and racial epithets, OHL issued 8 warnings, a suspension and a discharge; with the suspension arising from recidivism, and the discharge arising from both recidivism and a connected assault. In this case, Jones was neither a recidivist nor did she commit an assault. If OHL genuinely wanted to discipline her consistently, her misconduct would have generated the same warning that it uniformly issued to others.[22] See *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (disparate disciplinary treatment demonstrates pretext). Second, Carolyn Jones' firing is deeply inconsistent with OHL's willingness to completely overlook the several grossly offensive statements made by Phil Smith, a high-level supervisor, to subordinate employees.[23] Lastly, OHL's decision to terminate Carolyn Jones for this offense deviated from its progressive disciplinary system, which sets forth a lesser penalty for her violation, and allegedly espouses the merits of rehabilitation. (GC Exh. 35.)

I find, as a result, that its proffered reasons for Jones' discharge were mere pretexts and that antiunion animus motivated its actions. Accordingly, no further analysis of OHL's defenses is necessary. *Rood Trucking Co.*, supra at 898.

IV. REPRESENTATION CASE

A. Petition and Stipulated Election Agreement

On June 14, in Case 26–RC–8635, the Union filed an RC Petition seeking to represent OHL's employees. (U. Exh. 14.) On June 23, the parties entered into a Stipulated Election Agreement, whereby they agreed to allow the Board to conduct an election in the following unit:

> INCLUDED: All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operates 3, quality assurance coordinators, returns debts, and team leads employed by the Employer at [the facility].
>
> EXCLUDED: All other employe[e]s,[24] including, office clerical and professional employees, guards, and supervisors as defined in the Act.

(U Exh. 13.) As an addendum to the agreement, the parties agreed that:

> [T]he job classification of Administrative Assistant is in dispute and [will not be] place[d] in the inclusions or the exclusions of the Stipulated Election Agreement . . . . [T]he two administrative assistants Tia Harris and Rachel Maxie will vote subject to challenge by the Union . . . . If the challenged ballots . . . are determinative to the outcome of the election, the parties have agreed to resolve the matter in a post-election hearing. (U. Exh. 13A.)

B. Second Election

On July 27, the Board held an election, which the Union won by a single vote. The tally provided:

Category	Quantity
Approximate number of eligible voters	347
Number of votes cast for the Union	165
Number of votes cast against the Union	164
Number of challenged ballots	14

(U. Exh. 23.)

C. Union Objections[25]

On August 3, the Union filed 20 objections to OHL's conduct during the critical period preceding the second election, i.e., the period between the first election on March 16, 2010, and the second election on July 27.[26] (GC Exh 1(q).) Many of these objections duplicated the complaint allegations, which I have already found unlawful. The parties presented argument concerning these objections in their posthearing briefs.

1. Objection 1

Objection 1 alleged that OHL engaged in unlawful surveillance of union activities, in the manner described by the complaint. Given that I have found these allegations unlawful, this objection is valid.

2. Objection 2

Objection 2 alleged that OHL unlawfully interrogated employees. The Union contended that this objection was based upon the complaint's interrogation allegations, which I have found unlawful. Accordingly, I find merit to this objection.

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[21] As noted, several independent employee witnesses agreed that he threatened Jones.

[22] In an effort to respond to the disparate treatment allegation, OHL offered several examples of workplace misconduct, which prompted immediate firings. These example were, however, vastly more severe than Carolyn Jones' transgression, and, thus, not comparable. See (R. Exhs. 32–33 (workplace violence, theft of time, and sexually explicit misconduct)).

[23] Without disciplinary consequences, and in front of several witnesses, Phil Smith brazenly called an African American worker a "monkey on a stick," and another employee a "faggot ass."

[24] Contrary to OHL's position in its brief (see R. Br. at 43, fn. 19), I find that, although the stipulated election agreement, states under the unit exclusion paragraph, "[a]ll other employers," this is a typographical error and the parties clearly excluded, "all other employees." (U. Exh. 13.) First, excluding other "employers" from a unit of OHL employees is absurd. Second, the subsequent usage of the phrase, "office clerical and professional employees, guards and supervisors" as examples of excluded personnel indisputably clarifies that the parties' meant to say "employees," as opposed to "employers." Lastly, if OHL truly believed that the exclusion was supposed to say something other than "employees," it would have explained why it meant to say "employers."

[25] At the hearing, the union withdrew objection 7. (Tr. 1603.)

[26] *Star Kist Caribe, Inc.,* 325 NLRB 304 (1998) (second critical period runs from first election to second).

3. Objection 3

Objection 3 alleged that OHL issued Jennifer Smith a written warning, in retaliation for her union activities. Given that I have found the warning to be unlawful, this objection is valid.

4. Objection 4

Objection 4 alleged that OHL conducted captive audience meetings within 24 hours of the election. This objection focused on an alleged meeting between Senior Human Resources Coordinator Melissa Castillo and 3 employees within 24 hours of the election.

Glorina Kurtycz testified that, within hours of the election, she saw Castillo meeting with 3 employees in the break area. She stated that Castillo asked her for a sample ballot, which she declined to provide. Castillo testified that she attended the election, in order to offer translation for Spanish-speaking employees, but, did not recall speaking to the 3 employees at issue.

In general, the Board has held that employers and unions are prohibited from "making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood*, 107 NLRB 427 (1953). The Board has held, however, that this 24-hour rule "was not intended to . . . prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." *Business Aviation, Inc.*, 202 NLRB 1025 (1973). The Board has, as a result, explained that the rule does not prohibit employers and unions from making campaign speeches during the 24-hour period, if employee attendance is voluntary and on their own time. *Foxwoods Resort Casino*, 352 NLRB 771, 771, 780–781 (2008).

Even assuming arguendo that Kurtycz is fully credited, the Union failed to offer sufficient evidence regarding the substance of Castillo's discussion, or address whether employees voluntarily initiated the conversation on their own time. The Union has not, consequently, demonstrated that this meeting violated *Peerless Plywood*, and this objection is overruled.

5. Objection 5

Objection 5 alleged that OHL stated that, it would "bargain from scratch." Jerry Smith credibly testified that, at a June 28 meeting, Coleman made this statement:

> There's no guarantee that [I] can . . . get Mr. Brennan to sign a guarantee for benefits . . . . [W]hen you get to the bargaining table you have to start from scratch. And even though you bargain from scratch, you could already lose what you already have.

(Tr. 618.) Coleman denied these statements, and White failed to recall the specific meeting.

As a threshold matter, I credit Jerry Smith, who was a believable and straightforward witness, with a strong recall, over Coleman, who was less than credible. I also found Coleman's recollection of the relevant events to be poor. White's testimony about this issue was too general to be afforded much, if any, weight.

The Board and Courts have held that, barring outright threats to refuse to bargain in good faith with an incoming union, the legality of any particular statement depends upon its context. See *Somerset Welding & Steel, Inc.,* 314 NLRB 829, 832 (1994). Statements made in a coercive context, or designed to threaten employees that existing benefits will be lost if they unionize are unlawful, inasmuch as they, "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains Co.,* 336 NLRB 1119, 1119–1120 (2001). The Board has, as a result, found that statements analogous to those at issue herein were lawful in certain contexts, while unlawful in others. See, e.g., *Jefferson Smurfit Corp.,* 325 NLRB 280, fn. 3 (1998) (telling employees that benefits "could go either way" as a result of collective bargaining was lawful); *Earthgrains Co.,* supra (statement that everything was negotiable once the union was voted in was unlawful in the context of prior threats to withhold planned wage increases); *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000) (statements that negotiations would start from "scratch" were unlawful in the context of other unfair labor practices).

Given the many valid unfair labor practices and objections present herein, Coleman's comments unlawfully conveyed that employees would only achieve in bargaining "what the Union could induce the employer to restore." This objection, as a result, is sustained.

6. Objection 6

Objection 6 alleged that OHL confiscated union literature from break areas. Given that I have already found this allegation to be valid, this objection is sustained.

7. Objection 8

Objection 8 alleged that OHL aided employee union opposition by distributing antiunion t-shirts. The Union contended that such actions placed "employees in a position of having to make an observable choice that would reveal [their Union sentiments]." (U. Br. at 17.)

Jerry Smith credibly testified that, a week before the election, he observed a man loading boxes of lime green t-shirts bearing the slogan, "no means no," into Human Resources Manager Young's vehicle. Rayford credibly testified that, before the election, she observed Operations Supervisor Phillips distribute a bright blue, "I can speak for myself and no means no," t-shirt to Eric Collins, a coworker, by the lockers. She stated that she also saw a box of lime green, "no means no," shirts in Supervisor Owens' office, and saw her giving shirts to 2 coworkers. Such testimony was corroborated by considerable evidence of employees wearing these shirts in the facility. Given that I previously found Jerry Smith and Rayford to be highly credible, I credit their testimony on these issues. I also note that Owens was unavailable to testify to refute their accounts.

The Board has held that offering employees "vote no" buttons, t-shirts, or other paraphernalia is tantamount to an unlawful interrogation, inasmuch as it forces them to make an open declaration either for or against the Union. See *Houston Coca Cola Bottling Co.*, 256 NLRB 520 (1981). This objection is, accordingly, sustained.

8. Objections 9 and 11

Objection 9 alleged that OHL, "threatened . . . employees because of their Union activities." Objection 11 averred that OHL, "[t]hreatened employees with plant closure, reduction of work or relocation if the Union won." The Union asserted that these objections were based upon OHL's threats that it would lose customers, if employees unionized.

McNeal testified that she was told, at a captive-audience meeting, that the Fiskars account would "pull out," if employees unionized. Although she related that such meetings were attended by Phil Smith, Coleman, and White, she did not identify who made the statement, or confirm that this statement was not employee-generated. She also indicated that Phil Smith stated that Hewlett Packard would withdraw, if employees unionized, but, similarly failed to offer much detail about the comment. I, therefore, afford her testimony concerning these statements little, if any, weight. Jerry Smith credibly testified that, at a June 28 meeting, Tammy Stewart asked White whether OHL would lose clients if it unionized, and that White solely responded that certain accounts have not, to date, renewed their contracts. He recollected that Phil Smith added that contract renewal rests within the customer's sole discretion.

It is well settled that employer predictions of adverse consequences arising from sources outside its control are required to have an objective factual basis in order to be found lawful. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617–619 (1969). In the instant case, I find that White accurately conveyed that certain clients had not yet renewed their contracts, and Phil Smith truthfully added that customers retained the final decision on contract renewal. These statements were, thus, reasonable and these objections should be overruled.

9. Objection 10

Objection 10 alleged that OHL, "[c]reated the impression of futility of selecting the Union." This objection was based upon OHL telling employees that discriminatees Kurtycz, Dotson, and Jerry Smith had been only temporarily reinstated. Such commentary was technically true at the time, given that the injunction stated that it was "temporary," until such time as the Board issued its final order. (GC Exh. 4.) This objection, thus, lacks merit.

10. Objection 12

Objection 12 alleged that OHL threatened that employees would lose benefits, if they unionized. This objection was based upon OHL's comments about the 410K plan.

Jerry Smith credibly testified that he attended a meeting, where Human Resources Representative Dani Bowers told employees that they could not participate in the 401k plan, if they unionized.[27] Rayford corroborated this testimony, which Bowers was not called to refute. I, therefore, credit Jerry Smith's unrebutted and corroborated testimony.

A company commits objectionable conduct, when it threatens that employees will "be foreclosed from participating in their current company pension [or retirement] plan," if they unionize. *Longview Fibre Paper & Packaging*, 356 NLRB No. 108 (2011). Bowers' comments were, as a result, objectionable.

11. Objection 13

Objection 13 alleged that OHL unlawfully fired Carolyn Jones, Stanley Jones, and Vicky Hodges, because of their Union activities.[28] Given that I found that Carolyn Jones' discharge was unlawful, this component of the objection is valid.

12. Objection 14

Objection 14 alleged that OHL solicited union supporters to resign. Given that I found that this complaint allegation was unlawful, this objection is valid.

13. Objection 15

Objection 15 alleged that OHL told employees that, "they would be permanently . . . replaced, and will not be eligible for food stamps when the union called them out on strike." The Union filed to adduce any evidence supporting this objection; therefore, it is denied.

14. Objection 16

Objection 16 alleged that OHL "violated the stipulated agreement on . . . releasing of voters." Union Organizer Ben Brandon testified that, although the agreement contained a detailed release procedure, it was inconsistently followed and resulted in one department being released to vote prematurely and another released belatedly. Given that affected employees still voted, these isolated issues were de minimis, and not objectionable.

15. Objection 17

Objection 17 alleged that OHL "escort[ed] . . . discriminatees to the polls." Brandon testified that, while he did not directly observe discriminatees being escorted to the polls by security officers, he observed Carolyn Jones being admitted to the facility by security. This testimony, although credible, was insufficient to substantiate this objection.

16. Objections 18 and 20

Objection 18 alleged that OHL "created and condone[d] a hostile environment," while objection 20 alleged that OHL, "engaged in other conduct for which the election should be set aside." Given that I have already found that several objections were valid, these catchall objections, although duplicative, are legitimate.

17. Objection 19

Objection 19 alleged that OHL destroyed the laboratory conditions of the election by allowing Administrative Assistants to vote. This issue will be considered under the Challenged Ballots section, and is not objectionable.

D. OHL's Objections

On August 3, OHL filed 13 objections to the Union's preelection conduct. (GC Exh 1(q).) The parties presented con-

[27] I denied OHL's objection that this testimony was inadmissible hearsay. See Fed. R. Evid. 801(d)(2)(agent's admissions are not hearsay).

[28] No evidence was presented regarding Stanley Jones or Hodges; therefore, I find no merit to these allegations.

nected argument in their posthearing briefs.

1. Objections 1 and 2

Objection 1 alleged that the Union made, "inappropriate and inflammatory appeals to racial prejudice; whereas, objection 2 alleged that the Union made, "inappropriate and inflammatory appeals to violence." As will be discussed, these objections are meritless.

a. Inflammatory Leaflet

In support of these objections, OHL cites an exhibit (R. Exh. 20), which was not offered at the hearing (see (R. Br. at 45; tr. 1201–1203)), and a hearsay statement that an unnamed employee told White that the *unoffered* exhibit was distributed in the parking lot by anonymous individuals. Simply put, OHL wholly failed to substantiate this allegation.

b. "UT" Comments

Although Respondent failed to raise this issue in its brief, I note that I did find that Carolyn Jones called Lee Smith a "UT," in response to his failure to support the Union. There is, however, insufficient evidence that this statement was disseminated beyond two other voters, who had already taken a strong position on the election (i.e. Jerry Smith, a staunch Union supporter, and Jennifer Sims, a staunch OHL supporter). I find, as a result, that the "UT" comments were insufficient to affect the outcome of the election and not objectionable.

c. Hughes' Comments

Operations Manager Vania Washington testified that, a week before the election, she heard Hughes ask Michael Guy whether he had "heard what Coleman had said during a meeting?" She said that Hughes then told him that Coleman had called union supporters, "robbers and killers."

Operations Manager James Cousino testified that, at a captive audience meeting, Coleman read aloud a newspaper article concerning a labor dispute at another company, which involved violence. He related that, after the meeting, he heard Hughes state that Coleman had implied that OHL's employees were "thugs, gangbangers and killers." On cross-examination, however, Cousino acknowledged that the article read by Coleman described the involved union representatives as "gangbangers, thugs and killers." He surprisingly denied, however, that Coleman intentionally drew a connection between the Union involved herein and the "gangbangers, thugs, and killers" described by the article. He stated that, once he told Hughes to stop discussing the matter, he complied.

Hughes' comments were reasonable and responded to an article raised by Coleman at a captive audience meeting. OHL was obviously trying to draw a connection between the Union and the "gangbangers, thugs and killers" described by the article, in order to dissuade employees from unionizing and associating with alleged thugs. Hughes challenged this assertion in a reasonable way, and his commentary, which was isolated, was not objectionable.[29]

[29] It is also debatable whether Hughes, a union supporter, was a union agent.

2. Objections 3, 4, and 9

Objections 3, 4, and 9 alleged that the Union's election observers and release personnel engaged in inappropriate electioneering. Bobby Hill, an employee and OHL observer, testified that, on July 27, he and the Union's observer released employees to vote. He indicated that, at some point, a voter told the Union's observer that, "it didn't take me but 15 seconds to know how to vote," and that the Union's observer responded that he did the right thing, and offered him a "high five." He acknowledged, however, that this conversation was not witnessed by anyone, who had not yet voted.

I do not find that this postvote conversation was improper electioneering, which, by definition, needs to occur before votes are cast. These objections are, accordingly, overruled.

3. Objections 5, 6, 8, and 12

Objection 5 alleged that the Union issued, "[i]nappropriate instructions to employees not to vote." Objection 6 alleged that the Union "[told] employees that they were required to vote for the Union if they signed an authorization card." Objection 8 alleged that the Union, "[w]alk[ed] into unauthorized areas . . . to campaign to working employees on election day." Objection 12 alleged that the "Union observer display[ed] union insignia at [the] polling location by removing tape covering insignia before [the] polls closed." OHL failed to adduce any evidence supporting these objections, or raise these matters in its posthearing brief. These objections are, therefore, denied.

4. Objections 7, 10, and 11

Objections 7, 10, and 11 alleged that the Union unlawfully threatened pro-OHL employees with reprisals. Dawn Barnhill, an employee, testified that in July, Hughes observed her wearing a shirt, which stated "no means no, and I can speak for myself," and threatened to rip it off of her. She stated that she reported the incident to her supervisor, Cousino, who confirmed her account. Hughes consequently received a final warning.

These objections are invalid. First, as noted, there is no evidence that Hughes is a Union agent. Second, there is no evidence that his actions, which were isolated, were adopted by the Union or disseminated in a manner that would affect the election. Lastly, his actions were mitigated by OHL, when it disciplined him and erased any potential effect on voters.

5. Objection 13

Objection 13, a catchall objection, alleged that the Union, "[e]ngaged in conduct that interfered with employee free choice." Given that OHL's other objections were invalid, this objection is similarly overruled.

E. Challenged Ballots

The 10 challenged ballots are described below:[30]

Employee	*Challenged*	*Reason*

[30] At the hearing, the parties agreed that 3 additional voided ballots were "properly challenged . . . either because they were unclear or identified the voter." (Tr. 1701.) They also stipulated that challenge of Vicky Hodge's ballot was valid. (GC Exh. 1(q) at 2.)

	By	
Gloria Kurtycz	Company	Board Reinstatement
Brenda Stewart	Union	Supervisor
James Brewer	Union	Retired Part-time
Jerry Smith	Company	Board reinstatement
Carolyn Jones	Board	Not on list
Renal Dotson	Company	Board reinstatement
Rachel Maxie-Chaisson	Union	Administrative Assistant
Tammy Stewart	Union	Management
Tia Harris	Union	Management
Richard James	Union	Part-time

(GC Exh. 1(aa).)

1. Prior discriminatees: Kurtycz, Jerry Smith, and Renal Dotson

The Board affirmed the Administrative Law Judges' decisions to reinstate Kurtycz, Jerry Smith, and Renal Dotson. See *Ozburn I*, supra; *Ozburn II*, supra. Their challenges were, therefore, invalid, and their ballots should be counted.

2. Carolyn Jones

Given that OHL unlawfully fired Jones and reinstatement is appropriate, her challenge was invalid, and her ballot should be counted.

3. Part-time employees: Richard James and James Brewer

The Union challenged their ballots, and contended that they are part-time employees, who were expressly excluded by the Stipulated Election Agreement. OHL avers that the Agreement is ambiguous regarding their exclusion, they share a community of interest with the unit, and their challenges were, accordingly, inappropriate.

The Stipulated Election Agreement provided:

> INCLUDED: ***All full time*** custodians, . . . maintenance, maintenance techs, . . . employed by the Employer.
>
> EXCLUDED: All other employe[e]s, including, office clerical and professional employees, guards, and supervisors as defined in the Act.

(U. Exh. 13) (emphasis added). James and Brewer testified that they are part-time maintenance employees, who work 15 to 18 hours per week. They do not receive the health insurance, dental, disability, life insurance, or other benefits provided to full-time employees.[31]

In *Bell Convalescent Hospital*, 337 NLRB 191 (2001), the Board held:

> It is well settled that, in reviewing a stipulated unit, the Board's function is to ascertain the intent of the parties with regard to inclusion or exclusion of a disputed voter and then to determine whether such intent is inconsistent with any statutory provision or established Board policy. If the objective intent of the parties concerning the questioned portion of the unit description is expressed in clear and unambiguous terms, the Board will hold the parties to their agreement. In order to determine whether the stipulation is clear or ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classifications. The Board will find a clear intent to include those classifications that match the express language, and will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description. ***Under this view, if the classification is not included, and there is an exclusion for "all other employees," the stipulation will be read to clearly exclude that classification***. The Board bases this approach on the expectation that the parties are knowledgeable as to the employees' job title, and intend their descriptions in the stipulation to apply to those job titles.

Id. at 191 (citations omitted, with emphasis added).

Part-time employees were expressly excluded by the Stipulated Election Agreement, which only included, "[a]ll full time . . . maintenance [and] maintenance techs . . . employed by the Employer," while expansively excluding, "[a]ll other employe[e]s." Given that OHL obviously knew that it employed part-time maintenance employees when it signed the Agreement, I find that James and Brewer, as part-time employees, were expressly excluded, and their challenges were valid.[32] See *Bell Convalescent Hospital*, supra, 337 NLRB at 191–192 (excluding "central supply/patient supplies/nurse aide" classification, when the title was not expressly listed under inclusions and the stipulated election agreement broadly excluded "all other employees."); *Regional Emergency Medical Services*, 354 NLRB 224, 224–225 (2009) (excluding contingent employees from the unit, when the inclusions listed full and part-time employees and the stipulated election agreement extensively excluded "all other employees.").

4. Team leads: Brenda and Tammy Stewart

The union challenged the ballots of Team Leads Brenda and Tammy Stewart; it asserted that they were supervisory. OHL takes the opposite stance.

[31] Brewer testified that employees must work over 30 hours per week, in order to receive full-time benefits.

[32] Even if the language in the agreement were ambiguous, which it is not, I find that, if OHL intended to include part-time maintenance employees in the unit, it would taken one of the following steps: inserting "and regular part-time employees" under inclusions in the agreement; agreeing that they would vote subject to challenge; or litigating their inclusion in an R-case proceeding. It is noteworthy that the parties took such a step regarding the Administrative Assistants, when they expressly stated in a side agreement that they would "vote subject to challenge." (U. Exh. 13A.) OHL's failure to take a similar step regarding part-time employees suggests that their exclusion was intentional. Lastly, assuming arguendo that OHL employs other part-time employees beyond maintenance employees, it is unclear why it neglected to also raise the inclusion of these additional part-time employees, and solely focused on maintenance employees. Its unexplained failure to encourage other part-time employees to vote, and then comprehensively litigate their inclusion is inconsistent, and suggests that OHL is more concerned with election results than the agreement's fair construction.

a. Brenda Stewart

Brenda Stewart credibly testified that she unloads pallets, receives product from shippers, and retrieves product within the warehouse. She stated that she does not attend supervisory meetings and lacks disciplinary authority. She denied assigning work to employees.

Wayne Morton, former senior operations manager, credibly testified that Brenda Stewart is an hourly employee and team lead, who performs the same duties as other team leads, who were included in the unit. He added that she does not have a private office, uses a desk located on the shop floor, and is not supervisory.

Steele credibly testified that Brenda Stewart's duties include: confirming that product is unloaded; verifying that accurate data is listed on palletized product; and recording inventory on OHL's system. He stated that all team leads perform these tasks. He added that she does not transfer workers and lacks disciplinary authority.

Herron testified that Brenda Stewart is a managerial employee. However, beyond stating that she has specialized access to certain areas, she neglected to provide supporting detail.

b. Tammy Stewart

Tammy Stewart, a team lead, who works in the MAM Baby USA department, credibly denied having the authority to: assign work to team leads; recommend discipline; layoff; hire; or recall. She stated that she closes orders, "picks," "blasts," loads and unloads trucks, and receives product. Regarding assignments, she stated:

> I assign work . . . if my supervisor . . . releases the work, then I go in [the system], . . . if they run out, they will come to me if Jim is not around and I will give them more work. . . . So, however many is assigned to go out today if it's 18, then I divide those 18 up.

(Tr. 1669) (grammar as in original). She added that she equitably divides assignments, and does not consider who is better-suited for particular tasks. She averred that assignments are prioritized by the computerized inventory system by shipping date. She stated that she has a desk in the warehouse.

Steele credibly testified that he supervises Tammy Stewart, who picks, packs, ships, and closes orders. He stated that all team leads perform these tasks. He added that she does not transfer, interview or discipline employees.

McNeal testified that Tammy Stewart is an Operations Supervisor. She said that Tammy Stewart determines the arrival and departure times for trucks, and schedules breaks.

Hayes testified that, when she worked in the aerosol department roughly 2-1/2 years ago, Tammy Stewart periodically filled in for the manager, conducted morning meetings, and distributed assignments. She stated that other Team Leads reported to Tammy Stewart, who sat behind a desk, issued orders and trained them. She related that Tammy Stewart did not scan or label inventory, took her breaks in a separate area, and had keys to the buildings.

c. Legal Precedent

Section 2(11) defines a supervisor as:

> Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The party alleging supervisory status must establish that: the disputed individual possesses at least one of the supervisory authorities delineated above; and that independent judgment is used in exercising such authority.[33] *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). "Independent judgment" is defined as judgment that is, "free of the control of others . . . [and] not . . . dictated or controlled by detailed instructions . . . [including] the verbal instructions of a higher authority." Id. at 693.

d. Analysis

For several reasons, I find that the Union has failed to show that either Tammy or Brenda Stewart were supervisory. Because the record fails to reveal any evidence that they exercise the authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward, or discipline employees, or adjust their grievances, I will solely analyze their authority to assign and responsibly direct.

(I) ASSIGNING DUTIES

Neither Brenda nor Tammy Stewart exercise independent judgment, when assigning duties. The Board defines "assign" as:

> [T]he act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.

Oakwood Healthcare, supra, 348 NLRB at 689.

Regarding Brenda Stewart, the record fails to sufficiently show that she assigns work. It establishes that she solely performs the same hourly warehousing assignments performed by other hourly workers, i.e. receiving, stocking, retrieving, and shipping product.

Regarding Tammy Stewart, although I find that she assigns tasks to colleagues when they run out of work, I do not find that she exercises independent judgment in making such assignments. Her assignments are prioritized by the computer; and she provided unrebutted testimony that she never considers a worker's skills before assigning work, and robotically divides up the next series of assignments in the queue. Such activity falls short of the exercise of independent judgment. See *Sears,*

[33] Section 2(11) solely requires possession of a listed supervisory function, not its actual exercise. See *Barstow Community Hospital*, 352 NLRB 1052, 1052–1053 (2008). The fact that most of an alleged supervisor's duties involve routine tasks "does not preclude the possibility that such regular assignments require the exercise of independent judgment." *Loyalhanna Care Center*, 352 NLRB 863, 864, fn. 4 (2008).

Roebuck & Co., 292 NLRB 753, 754–755 (1989).

(II) RESPONSIBLE DIRECTION

Neither Brenda nor Tammy Stewart responsibly directs employees. Such authority exists when:

> [An employee decides] what job shall be undertaken next or who shall do it, . . . provided the direction is both "responsible" . . . and carried out with independent judgment.

Oakwood Healthcare, Inc., supra, 348 NLRB at 691. "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task . . . such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." Id. at 692.

Even assuming arguendo that Brenda and Tammy Stewart direct coworkers to perform tasks, and exercise independent judgment in doing so, which it does not, the record failed to reveal evidence of "actual accountability." Moreover, the record failed to demonstrate that they were potentially subject to adverse consequences, if assignments were delayed or unsatisfactory. Accordingly, I find that they do not responsibly direct others. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

(III) CONCLUSION

Brenda and Tammy Stewart are not supervisory; they are Team Leads, who are included in the unit under the Stipulated Election Agreement. Their challenges are, thus, overruled.

5. Administrative assistants: Harris and Maxie-Chaisson

The Union challenged these ballots and contended that the employees are office clericals, who should be excluded. OHL avers that they are plant clericals, and should be included.

a. Harris

Administrative Assistant Harris testified that she works at a desk, and spends the majority of her time using the computer. She explained that she uses the REDPRAIRIE application, which generates reports on warehouse operations and productivity. She stated that these reports are primarily disseminated to managers, who use such to determine proper staffing levels. She stated that she tracks the productivity of every employee on the warehouse floor and generates related reports. She added that she has no discretion to set productivity targets and only collects and processes data. She noted that she also uses ACCUPLUS software to perform accounts receivable and billing work. She conceded that she did not vote in the first election.

Cotton, a customer service representative, testified that Harris' office is located in an area, which requires special access and states, "authorized employees only." She related that Harris does not share the same break room with rank and file employees, and that she rarely observes her on the warehouse floor. She stated that operators and other members of the unit spend most of their workday on the warehouse floor. Wells and Herron corroborated Cotton's account.

b. Maxie-Chaisson

Administrative Assistant Maxie-Chaisson testified that she uses the REDPRAIRIE system to track productivity. She indicated that she posts productivity reports, and explains data to employees, when asked. She explained that the REDPRAIRIE system shows managers where they can better place people and product within the warehouse. She indicated that she also performs some accounts receivable and billing work.

McNeal testified that she has never seen Maxie-Chaisson retrieving warehouse stock, shipping product, or engaging in other activities normally performed by Operators. Rayford corroborated McNeal's testimony. Phil Smith testified that Maxie-Chaisson is essentially a data clerk, who is paid at a lower rate than several Team Leads.

c. Analysis

Harris and Maxie-Chaisson are office clerical employees, who should be excluded from the unit. Concerning the distinction between office and plant clericals the Board has held that:

> [T]he distinction between office and plant clericals is rooted in community of interest concepts. Clericals whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals who do not have a close community of interest with a production unit. This is true even if those clericals spend as much as 25 percent of their time in the production area and have daily contact with production personnel.

Mitchellace, Inc., 314 NLRB 536, 536–537 (1994) (citations omitted).

My finding that Harris and Maxie-Chaisson are office clerical employees is based upon several factors. They work in a separate office area, and spend an extremely small percentage of their work time on the warehouse floor. They are data clerks, who mainly sit behind a computer, prepare productivity reports and perform accounts receivable work. Their reports are primarily used by management to gauge productivity and resource allocation. On some occasions, these reports can also be used to support a discipline, transfer or layoff. Under these circumstances, their challenges are valid. See, e.g., *Mitchellace, Inc.*, supra, 314 NLRB at 536–537 (analogous data entry clerks were office clerical employees); *Virginia Mfg. Co., Inc.*, 311 NLRB 992 (1993) (analogous production control clerk, who compiled production information, kept track of inventory and raw materials, and prepared reports for management that determined daily production priorities, was an office clerical).

F. Conclusion

The 6 ballots cast by Kurtycz, Jerry Smith, Carolyn Jones, Dotson, Brenda Stewart, and Tammy Stewart should be counted. The ballots cast by Brewer, James, Harris, and Maxie-Chaisson should not be counted. The 6 uncounted ballots are sufficient in number to affect the outcome of the election, which was decided a single vote.

Union objections 1–3, 5–6, 8, 12–14, 18, and 20 are valid. The conduct underlying these objections, much of which also

violated Sections 8(a)(1) and (3), prevented employees from exercising free choice during the July 27 election.[34] Accordingly, in the event that the Union does not win the election after the 6 challenged ballots are counted, I recommend that the second election be invalidated, and that employees be permitted to vote in a third untainted election. See *General Shoe Corp.,* 77 NLRB 124 (1948); *IRIS U.S.A., Inc.,* 336 NLRB 1013 (2001).

CONCLUSIONS OF LAW

1. OHL is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. HL violated Section 8(a)(1) of the Act by

(a) Threatening employees with discipline and other unspecified reprisals, if they engage in union or other protected concerted activities;

(b) Interrogating employees concerning their union or other protected concerted activities;

(c) Engaging in surveillance of employees' union or other protected concerted activities;

(d) Creating the impression that employee union activities were under surveillance;

(e) Confiscating union materials and related documents from employee break areas; and

(f) Telling employees, who support the Union, to resign.

2. OHL violated Section 8(a)(1) and (3) of the Act by issuing a final written warning to Jennifer Smith, and by discharging Carolyn Jones, because they engaged in union or other protected concerted activities.
3. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.
4. OHL has not otherwise violated the Act.
5. By the foregoing violations of the Act, which occurred during the critical period before the second election, and by the conduct cited by the Union in objections 1–3, 5–6, 8, 12–14, 18, and 20, OHL has prevented the holding of a fair second election, and such conduct warrants setting aside the July 27, 2011 election in Case 26–RC–8635.[35]

REMEDY[36]

Having found that OHL has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

OHL, having unlawfully discharged Carolyn Jones, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the date of her discharge to the date of her proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

OHL shall also expunge from its records any references to Jennifer Smith's final warning and Carolyn Jones' discharge, give them written notice of such expunction, and inform them that its unlawful conduct will not be used against them as a basis for future discipline.

OHL shall distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees at the facility, in addition to the traditional physical posting of paper notices. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

In addition to the traditional remedies for the 8(a)(1) and (3) violations found herein, OHL shall permit a Board agent to read the notice marked "Appendix" to unit employees at its facility, during work time, in the presence of Coleman and Phil Smith. A notice reading will counteract the coercive impact of the instant unfair labor practices, which were substantial and pervasive. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004). It will also foster the environment required for a final third election result, if such an election is required.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[37]

ORDER

The Respondent, Ozburn-Hessey Logistics, LLC, Nashville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Threatening employees with discipline and other unspecified reprisals, if they engage in union or other protected concerted activities.

b. Interrogating employees concerning their union or other protected concerted activities.

c. Engaging in surveillance of employees' union or other protected concerted activities.

d. Creating the impression that employee union activities were under surveillance.

e. Confiscating union materials and related documents from employee break areas.

f. Telling employees, who support the Union, to resign.

g. Terminating, issuing final warnings, or otherwise disciplining employees for engaging in union activities.

h. In any other manner interfering with, restraining, or coerc-

[34] OHL's objections were, as noted, not valid.

[35] As noted, a rerun election is only warranted, if the counting of the challenges causes the Union to lose the second election.

[36] In the complaint, the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. He also requests that OHL be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. These requests are denied, inasmuch as the granting of such remedies deviates from current Board law. See *Metropolitan Hotel Group*, 358 NLRB No. 30, slip op. at 4, fn. 4 (2012); *Waco, Inc.*, 273 NLRB 746 fn. 14 (1984) (holding that "[i]t is for the Board, not the judge, to determine whether . . . precedent should be varied.").

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[38]

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of the Board's Order, offer Carolyn Jones her former job or, if such job no longer exists, offer her a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

b. Make Carolyn Jones whole for any loss of earnings and benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this Decision.

c. Within 14 days from the date of the Board's Order, remove from its files any reference to Carolyn Jones' unlawful discharge, and Jennifer Smith's unlawful final warning, and within 3 days thereafter notify them in writing that this has been done and that their discipline will not be used against them in any way.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

e. Within 14 days after service by the Region, physically post at its Memphis, Tennessee facility, and electronically send and post via email, intranet, internet, or other electronic means to its unit employees who were employed at its Memphis, Tennessee facility at any time since April 11, 2011, copies of the attached Notice marked "Appendix."[39] Copies of the Notice, on forms provided by the Regional Director for Region 26, after being signed by OHL's authorized representative, shall be physically posted by OHL and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by OHL to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, OHL has gone out of business or closed the facility involved in these proceedings, OHL shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by it at the facility at any time since April 11, 2011.

f. Within 14 days after service by the Region, hold a meeting or meetings at the facility, during working hours, which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked "Appendix" is to be read to unit employees by a Board agent, in the presence of Senior Vice President of Operations Randall Coleman and Director of Operations Phil Smith.

g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Regional Director for Region 26 shall, in the event that the inclusion and counting of the 6 challenged ballots does not result in the Union winning the representation election conducted in Case 26–RC–8635, set aside that election result, and hold a new election at a date and time to be determined by the Regional Director.

Dated Washington, D.C. May 15, 2012

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT threaten you with discipline and other unspecified reprisals, because you support the United Steelworkers Union (the Union) or any other union.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT confiscate union materials and related documents from employee break areas.

WE WILL NOT tell employees, who support the Union, to resign.

WE WILL NOT fire you, issue final warnings, or otherwise discriminate against you because you support the Union or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Carolyn Jones full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Carolyn Jones whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Caro-

[38] A broad cease and desist order is appropriate herein. See, e.g., *Regency Grande Nursing & Rehabilitation Center*, 354 NLRN 530, 531, fn. 10 (2009).

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

lyn Jones and the unlawful final warning to Jennifer Smith.

WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge and final warning will not be used against them in any way.

WE WILL hold a meeting, or meetings, during working hours and have this notice read to you by an agent of the National Labor Relations Board, in the presence of our current senior vice president of operations and director of operations.

OZBURN-HESSEY LOGISTICS, LLC

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14TH STREET NW
WASHINGTON DC 20570

Re: OZBURN-HESSEY LOGISTICS, LLC
Cases 26-CA-024057; 26-CA-024065; 26-CA-024090; and 26-RC-008635

ORDER

The Respondent's Emergency Motion to stay the Region's opening and counting of ballots directed by the Board's May 2, 2013 Decision, Order, and Direction in this case is denied. The Respondent has provided no compelling reason to depart from the Board's longstanding practice of continuing to process representation matters, notwithstanding that review of the final Board Order in the companion unfair labor practice case is pending in a court of appeals, and has failed to demonstrate that it will suffer irreparable harm if the Region proceeds with the opening and counting of the ballots scheduled for May 14, 2013.[1]

Dated, Washington, D.C., May 13, 2013.

MARK GASTON PEARCE, CHAIRMAN

RICHARD F. GRIFFIN, JR., MEMBER

SHARON BLOCK, MEMBER

[1] The Respondent's Motion to Stay also contends that the Board lacked a quorum to issue its May 2, 2013 Decision, Order, and Direction because the President's recess appointments are constitutionally invalid. For the reasons stated in *Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013), these arguments are rejected.

FORM NLRB-4168
(7-92)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Ozburn-Hessey Logistics, LLC
Employer

and

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
Petitioner

Case No. 26-RC-8635

Date Issued 05/14/2013

TYPE OF ELECTION: *(Check one:)*

- ☐ Consent Agreement
- ☒ Stipulation
- ☐ Board Direction
- ☐ RD Direction

(Also check box below where appropriate)

- ☐ 8(b) (7)

REVISED TALLY OF BALLOTS

(Counting of Challenged Ballots)

The undersigned agent of the Regional Director certifies that the results of counting the challenged ballots directed to be counted by the National Labor Relations Board on 05/14/2013 and the addition of these ballots to the original Tally of Ballots, executed on 07/27/2011 ,were as follows:

	Original Tally	Challenged Ballots Counted	Final Tally
Approximate number of eligible voters	358		
Number of Void ballots	0	0	
Number of Votes cast for USWA	165	4	169
Number of Votes cast for			
Number of Votes cast for			
Number of Votes cast against participating labor organization(s)	164	2	166
Number of Valid votes counted	329		~~335~~ 335
Number of undetermined challenged ballots	14		0
Number of Valid votes counted plus challenged ballots	343		335
Number of Sustained challenges *(voters ineligible)*			

The remaining undetermined challenged ballots, if any, shown in the Final Tally column are (not) sufficient to affect the results of the election. A majority of the valid votes plus challenged ballots as shown in the Final Tally column has (not) been cast for

PETITIONER

DATE: May 14, 2013
TIME: 10:20 am

For the Regional Director, Region 15 David W. Midler

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the Final Tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

For EMPLOYER

For PETITIONER Ben Brandon

For

For

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

OZBURN-HESSEY LOGISTICS, LLC	**Case 15-CA-109236**
and	
UNITED STEELWORKERS UNION	

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by United Steelworkers Union (Union). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act) and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Ozburn-Hessey Logistics, LLC (Respondent) has violated the Act as described below:

1. The charge in this proceeding was filed by the Union on July 16, 2013, and a copy was served by regular mail on Respondent on July 17, 2013.

2(a) At all material times, Respondent has been a limited liability company with an office and places of business in Memphis, Tennessee (Respondent's facilities) and has been engaged in providing transportation, warehousing, and logistics services.

(b) In conducting its operations annually, Respondent performed services valued in excess of $50,000 in States other than the State of Tennessee.

(c) In conducting its operations annually, Respondent purchased and received at its Memphis, Tennessee facilities goods valued in excess of $50,000 directly from points outside the State of Tennessee.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, Karen White held the position of Respondent's Regional Vice President and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

6. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at the Memphis, Tennessee facilities located at 5510 East Holmes Road, 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road, excluding all other employees, including, office clerical and professional employees, guards, and supervisors as defined in the Act.

7. On May 24, 2013, the Board certified the Union as the exclusive collective-bargaining representative of the Unit.

8. At all times since May 24, 2013, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

9. About June 3, 2013, the Union, by letter, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

10. Since about June 17, 2013, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

11. By the conduct described above in paragraph 10, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1 and (5) of the Act.

12. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before August 13, 2013, or postmarked on or before August 12, 2013**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a

complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on a **date, time and place to be determined**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: July 30, 2013

M. KATHLEEN MCKINNEY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 15
600 SOUTH MAESTRI PLACE, 7TH FLOOR
NEW ORLEANS, LOUISIANA 70130-3408

FORM NLRB-4338
(2-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 15-CA-109236

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

KAREN WHITE, REGIONAL VICE PRESIDENT OZBURN-HESSEY LOGISTICS, LLC 5510 E. HOLMES RD MEMPHIS, TN 38118-7948	S.G. CLARK, JR., GENERAL ATTORNEY-LABOR UNITED STATES STEEL CORPORATION 600 GRANT STREET PITTSBURGH, PA 15230
BEN H. BODZY, ESQ. BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC 211 COMMERCE ST STE 800 NASHVILLE, TN 37201-1817	RICHARD J. BREAN, GENERAL COUNSEL UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC 5 GATEWAY CTR., STE 807 PITTSBURGH, PA 15222
UNITED STEEL, PAPER, AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC 3340 PERIMTER HILL DRIVE NASHVILLE, TN 37211	
GLENN M. CONNOR, ATTORNEY QUINN, CONNOR, WEAVER, DAVIES & ROUCO LLP 2700 HIGHWAY 280 S STE 380 MOUNTAIN BRK, AL 35223-2420	

IMPORTANT NOTICE

The date, which has been set for hearing in this matter, should be checked immediately. If there is proper cause for not proceeding with the hearing on that date, a motion to change the date of hearing should be made within fourteen (14) days from the service of the complaint. Thereafter, it may be assumed that the scheduled hearing date has been agreed upon and that all parties will be prepared to proceed to the hearing on that date. Later motions to reschedule the hearing generally may not be granted in the absence of a proper showing of unanticipated and uncontrollable intervening circumstances.

All parties are encouraged to fully explore the possibilities of settlement. Early settlement agreements prior to extensive and costly trial preparation may result in substantial savings of time, money and personnel resources for all parties. The Board agent assigned to this case will be happy to discuss settlement at any mutually convenient time.

M. KATHLEEN MCKINNEY
REGIONAL DIRECTOR

Form NLRB-4668
(4-05)

SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD BEFORE THE NATIONAL LABOR RELATIONS BOARD IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

(OVER)

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

In the discretion of the administrative law judge, any party may, on request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the administrative law judge who will fix the time for such filing. Any such filing submitted shall be double-spaced on 8 1/2 by 11 inch paper.

Attention of the parties is called to the following requirements laid down in Section 102.42 of the Board's Rules and Regulations, with respect to the procedure to be followed before the proceeding is transferred to the Board: No request for an extension of time within which to submit briefs or proposed findings to the administrative law judge will be considered unless received by the Chief Administrative Law Judge in Washington, DC (or, in cases under the branch offices in San Francisco, California; New York, New York; and Atlanta, Georgia, the Associate Chief Administrative Law Judge) at least 3 days prior to the expiration of time fixed for the submission of such documents. Notice of request for such extension of time must be served simultaneously on all other parties, and proof of such service furnished to the Chief Administrative Law Judge or the Associate Chief Administrative Law Judge, as the case may be. A quicker response is assured if the moving party secures the positions of the other parties and includes such in the request. All briefs or proposed findings filed with the administrative law judge must be submitted in triplicate, and may be printed or otherwise legibly duplicated with service on the other parties.

In due course the administrative law judge will prepare and file with the Board a decision in this proceeding, and will cause a copy thereof to be served on each of the parties. Upon filing of this decision, the Board will enter an order transferring this case to itself, and will serve copies of that order, setting forth the date of such transfer, on all parties. At that point, the administrative law judge's official connection with the case will cease.

The procedure to be followed before the Board from that point forward, with respect to the filing of exceptions to the administrative law judge's decision, the submission of supporting briefs, requests for oral argument before the Board, and related matters, is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be served on the parties together with the order transferring the case to the Board.

Adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations. If adjustment appears possible, the administrative law judge may suggest discussions between the parties or, on request, will afford reasonable opportunity during the hearing for such discussions.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

OZBURN-HESSESY LOGISTICS, LLC

and Case 15-CA-109236

UNITED STEELWORKERS UNION

ANSWER TO COMPLAINT AND NOTICE OF HEARING

Pursuant to NLRB Rules and Regulations 102.20 and 102.21, Ozburn-Hessessy Logistics, LLC ("OHL") submits this Answer to Complaint and Notice of Hearing ("Complaint") and states as follows:

1.

OHL admits the allegations in Paragraph 1 of the Complaint.

2.

OHL admits the allegations in Paragraphs 2(a-c) of the Complaint.

3.

OHL admits the allegations in Paragraph 3 of the Complaint.

4.

OHL admits the allegations in Paragraph 4 of the Complaint.

5.

OHL admits the allegations in Paragraph 5 of the Complaint.

6.

OHL denies the allegations in Paragraph 7 of the Complaint.

7.

OHL admits that on May 24, 2013 the Board certified the USW as the exclusive Collective Bargaining Representative of the unit, but OHL denies that said certification was proper.

8.

OHL denies the allegations in Paragraph 8 of the Complaint.

9.

OHL admits that the union, by letter, requested that OHL bargain collectively with it. OHL denies that the USW is the exclusive collective bargaining representative of its employees, and it further denies that it was under obligation to bargain with the USW.

10.

OHL admits that since about June 17, 2013, it has refused to recognize and bargain with the USW as the exclusive collective bargaining representative of its Memphis employees. However, OHL denies that it has "failed" to recognize and bargain with the USW, since the certification of the USW was improper, and OHL is under no legal obligation to recognize it.

11.

OHL denies the allegations in Paragraph 11 of the Complaint.

12.

OHL denies the allegations in Paragraph 12 of the Complaint.

All allegations not specifically admitted are denied.

FIRST DEFENSE

The Complaint fails, in whole or in part, to state a claim upon which relief may be granted.

SECOND DEFENSE

The certification of the USW resulted from counting ballots of voters who were ineligible to vote at the time of the election.

THIRD DEFENSE

The certification of the USW resulted from counting ballots of employees who were validly terminated by OHL prior to the election and who were therefore ineligible to vote.

FOURTH DEFENSE

The certification of the USW resulted from counting ballots of voters whose eligibility was determined by the decision of a Board that lacked a constitutional quorum, and was comprised of unconstitutional recess appointments.

FIFTH DEFENSE

The certification of the USW resulted from the improper direction to count ballots by a Board that lacked a constitutional quorum, and was comprised of unconstitutional recess appointments.

SIXTH DEFENSE

The certification of the USW resulted from counting ballots of voters whose eligibility turned on cases pending before the United States Court of Appeals for the D.C. Circuit.

SEVENTH DEFENSE

The certification of the USW resulted from the exclusion of eligible ballots case by two Administrative Assistants.

EIGTH DEFENSE

The certification of the USW resulted from an election that should have been set aside as a result of OHL's objections thereto.

NINTH DEFENSE

OHL is testing the validity of the certification of the USW.

WHEREFORE, having fully answered the Complaint, OHL requests that the Complaint be dismissed with prejudice.

Respectfully submitted,

Ben H. Bodzy (#23517)
Stephen Goodwin (#006294)
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
Baker Donelson Center, Suite 800
211 Commerce Street
Nashville, Tennessee 37201
(615) 726-5600

Attorneys for Ozburn-Hessey Logistics, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Answer to Complaint and Notice of Hearing* has been emailed and mailed, postage prepaid to:

Mr. Charles Rogers
National Labor Relations Board
Region 15
600 S Maestri Pl, Floor 7
New Orleans, LA 70130-3414

Mr. Glenn Connor
Quinn, Connor, Weaver, Davies & Rouco, LLP
2700 Highway 280 S, Suite 380
Birmingham, AL 35223-2420

this 13th day of August, 2013.

Ben H. Bodzy

N BHB 975058 v1
2902696-000096 08/13/2013

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

OZBURN-HESSEY LOGISTICS, LLC	*	
	*	**Case No. 15-CA-109236**
and	*	
UNITED STEEL, PAPER & FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS	*	

MOTION FOR SUMMARY JUDGMENT

The undersigned Counsel for the Acting General Counsel hereby moves that the matter referenced above be transferred and continued before the National Labor Relations Board (Board) and further moves for summary judgment on the pleadings and supporting papers and for issuance of a Decision and Order by the Board, pursuant to Sections 102.24 and 102.50 of the Board's Rules and Regulations. In support of this Motion, Counsel for the Acting General Counsel avers as follows:

1. On May 2, 2013, the Board issued its decision in *Ozburn-Hessey Logistics, LLC*, 359 NLRB No. 109 (2013) ordering the Regional Director of Region 26 of the Board to open and count the ballots of six employees, whose ballots had been challenged by Ozburn-Hessey Logistics, LLC (Respondent) and the United Steelworkers Union (Union) at the July 27, 2011 representation election held among a unit of Respondent's employees. The Board's decision in *Ozburn-Hessey Logistics, LLC*, 359 NLRB No. 109 (2013) is attached as Exhibit A.

2. On May 24, 2013, after counting the ballots as directed by the Board, the Acting Regional Director of Region 15 of the Board[1] certified the Union as the exclusive collective-bargaining representative of a unit of Respondent's employees. The certification is attached as Exhibit B.

3. On July 16, 2013, the Union filed the charge in Case No. 15-CA-109236 alleging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by failing and refusing to bargain collectively with the certified bargaining representative of its employees by refusing to meet, bargain, or negotiate with the certified representative. On July 17, 2013, the charge was served on Respondent. A copy of the charge in Case No. 15-CA-109236 along with the affidavit of service are attached as Exhibits C and D, respectively.

4. On July 30, 2013, the Regional Director of Region 15 of the Board issued a Complaint and Notice of Hearing (Complaint) alleging that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit of Respondent's employees described in the Complaint. A copy of the Complaint along with the affidavit of service is attached as Exhibit E.

5. On August 13, 2013, Respondent filed an Answer to the aforementioned Complaint. A copy of the Answer is attached as Exhibit F. On August 13, 2013, Respondent filed an Amended Answer to the aforementioned Complaint. A copy of the Amended Answer is attached as Exhibit E. In its Amended Answer, Respondent admits the filing and service of the charge, the commerce facts, Respondent's status as an employer engaged in commerce, the Union's status as a labor organization, and the supervisory and agency status of Karen White.

[1] Region 26 was merged into Region 15 on December 10, 2012. All documents that pertain to this case filed before that date are listed as originating in Region 26 and all documents that pertain to this case filed after that date are listed as originating in Region 15.

6. Also in its Amended Answer, Respondent does the following:

(a) Admits that the Board certified the Union as the exclusive collective-bargaining representative of the unit described in paragraph 6 of the Complaint (Unit) on May 24, 2013, but denies that the certification was proper;

(b) Admits that the Union, by letter, requested that Respondent bargain collectively with it, but denies that the Union is the exclusive collective-bargaining representative of the Unit and denies that Respondent was under an obligation to bargain with the Union;

(c) Admits that it has refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit since about June 17, 2013, but denies that it has "failed' to recognize and bargain with the Union because the Union's certification was improper and because Respondent is under no legal obligation to recognize the Union.

7. In its Amended Answer, Respondent denies the following:

(a) The Unit is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act; and

(b) The Union has been the exclusive collective-bargaining representative of the Unit since May 24, 2013.

8. Finally, in its Amended Answer, Respondent denies the allegations that its conduct, as described above in paragraphs 5 and 6, violated the Act or that these alleged violations of the Act affected commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent also alleges the following affirmative defenses:

(a) The Complaint fails to state a claim upon which relief may be granted;

(b) The certification of the Union resulted from counting ballots of voters who were ineligible to vote at the time of the election;

(c) The certification of the Union resulted from counting ballots of employees who were validly terminated by Respondent prior to the election and who were, therefore, ineligible to vote;

(d) The certification of the Union resulted from counting ballots of voters whose eligibility was determined by the decision of a Board that lacked a constitutional quorum and was comprised of unconstitutional recess appointments;

(e) The certification of the Union resulted from the improper direction to count ballots by a Board that lacked a constitutional quorum and was comprised of unconstitutional recess appointments;

(f) The certification of the Union resulted from counting ballots of voters whose eligibility turned on cases pending before the United States Court of Appeals for the D.C. Circuit;

(g) The certification of the Union resulted from the exclusion of eligible ballots cast by two Administrative Assistants;

(h) The certification of the Union resulted from an election that should have been set aside as a result of Respondent's objections thereto; and

(i) Respondent is testing the validity of the certification of the Union.

10. Counsel for the Acting General Counsel submits that the only allegations denied by Respondent are legal conclusions or matters decided by the Board in *Ozburn-Hessey Logistics, LLC*, 359 NLRB No. 109 (2013). Thus, Counsel for the Acting General Counsel

maintains that the matters denied by Respondent in its Answer may be evaluated and decided in this proceeding without the need for a hearing.

Therefore, inasmuch as Respondent has admitted in its Answer facts sufficient to establish Respondent violated the Act as alleged in the Complaint, Respondent's defenses raise no material issues of fact requiring a hearing and, for the reasons set forth in the attached Memorandum, Counsel for the Acting General Counsel moves that all allegations in the Complaint be deemed to be true and be so found, that the Board issue its Decision and Order based on such findings, and that the Board grant such relief as may be appropriate.

Dated at New Orleans, Louisiana this 22nd day of August, 2013.

Respectfully Submitted,

_____

Charles R. Rogers
Counsel for the Acting General Counsel
National Labor Relations Board, Region 15
600 South Maestri Place, 7th Floor
New Orleans, Louisiana 70130
(504) 589-6368
(504) 589-4069 (facsimile)
charles.rogers@nlrb.gov

Ozburn-Hessey Logistics, LLC *and* United Steelworkers Union. Cases 26–CA–024057, 26–CA–024065, 26–CA–024090, and 26–RC–008635

November 17, 2014

DECISION, ORDER, AND CERTIFICATION

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND SCHIFFER

On May 2, 2013, the Board issued a Decision, Order, and Direction in this proceeding, which is reported at 359 NLRB No. 109 (2013).[1] Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision, Order, and Direction, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. On June 27, 2014, the Board issued an order setting aside its Decision, Order, and Direction and retained this case on its docket for further action as appropriate.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision, Order, and Direction, and we agree with the rationale set forth therein.[3] Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision, Order, and Direction reported at 359 NLRB No. 109, which is incorporated herein by reference.[4]

The Decision, Order, and Direction adopted, inter alia, the administrative law judge's resolution of 10 challenged ballots. Having also adopted that resolution herein, our normal practice would be to direct the Regional Director to open and count the challenged ballots, to prepare and serve on the parties a revised tally of ballots, and to issue an appropriate certification. However, the Regional Director has already performed these ministerial tasks in response to the Board's original Decision, Order, and Direction, and we see no purpose to be served by requiring the Regional Director to repeat them. Thus, the revised tally of ballots that issued on May 14, 2013, accurately presents the results of the election, and the Certification of Representative issued by the Acting Regional Director on May 24, 2013, is based upon the valid votes cast. The revised tally shows 169 for and 166 against the Petitioner, with no challenged ballots. There is no question that a majority of valid ballots was cast for the Union, and there is no question that the certification issued by the Acting Regional Director is substantively correct. Nevertheless, in an abundance of caution and in an effort to avoid further litigation that would only serve to further delay this matter, we will issue a new Certification of Representative.

ORDER

The National Labor Relations Board orders that the Respondent, Ozburn-Hessey Logistics, LLC (OHL), Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discipline and other unspecified reprisals if they engage in union or other protected concerted activities.

(b) Interrogating employees concerning their union or other protected concerted activities.

(c) Engaging in surveillance of employees' union or other protected concerted activities.

(d) Creating the impression that employee union activities are under surveillance.

[1] On May 13, 2013, the Board issued an Order denying the Respondent's emergency motion to stay the opening and counting of ballots. We agree with that denial for the reasons stated in the Board's Order.

[2] Accordingly, on August 18, 2014, on motion by the Board, the court of appeals dismissed the case.

[3] In finding that the Respondent's interrogation of employee Sharon Shorter also created an impression of unlawful surveillance, we rely on *Conley Trucking*, 349 NLRB 308, 315 (2007), enfd. 520 F.3d 629 (6th Cir. 2008). We do not rely on *McClain & Co*., 358 NLRB No. 118 (2012), cited in the vacated Decision, Order, and Direction.

[4] We shall modify the judge's recommended Order and notice in accordance with our recent decisions in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and *Durham School Services*, 360 NLRB No. 85 (2014).

In adopting the judge's recommendation to include a notice reading remedy, we do not rely on *Jason Lopez' Planet Earth Landscape*, 358 NLRB No. 46 (2012), cited in the vacated Decision, Order, and Direction. In modifying the judge's remedy to permit the Respondent, at its option, to have its managers, Senior Vice President of Operations Randall Coleman and Director of Operations Phil Smith, read the notice aloud to employees during working time in the presence of a Board agent, or to permit a Board agent to read the notice aloud to employees in those managers' presence, we rely on *HTH Corp.*, 356 NLRB No. 182, slip op. at 8 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012). We do not rely on *Marquez Bros. Enterprises*, 358 NLRB No. 61 (2012), cited in the vacated Decision, Order, and Direction.

(e) Confiscating union materials and related documents from employee break areas.

(f) Telling employees who support the Union to resign.

(g) Terminating, issuing final warnings, or otherwise disciplining employees for engaging in union activities.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Carolyn Jones full reinstatement to her former job or, if such job no longer exists, offer her a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Carolyn Jones whole for any loss of earnings and benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate Carolyn Jones for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to Carolyn Jones' unlawful discharge, and Jennifer Smith's unlawful final warning, and within 3 days thereafter notify them in writing that this has been done and that their discipline will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by OHL's authorized representative, shall be physically posted by OHL and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by OHL to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, OHL has gone out of business or closed the facility involved in these proceedings, OHL shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the facility at any time since April 11, 2011.

(g) Within 14 days after service by the Region, hold a meeting or meetings at the facility, during working hours, which will be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to the unit employees by Randall Coleman and Phil Smith in the presence of a Board agent, or, at the Respondent's option, by a Board agent in those officials' presence.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at its Memphis, Tennessee facilities located at: 5510 East Holmes Road; 5540 East Holmes Road; 6265 Hickory Hill Road; 6225 Global Drive; 4221 Pilot Drive; and 5050 East Holmes Road. Excluded: All other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. November 17, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discipline and other unspecified reprisals because you support the United Steelworkers Union (the Union) or any other union.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT confiscate union materials and related documents from employee break areas.

WE WILL NOT tell employees who support the Union to quit.

WE WILL NOT fire you, issue final warnings, or otherwise discriminate against you because you support the Union or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights described above.

WE WILL, within 14 days from the date of this Order, offer Carolyn Jones full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Carolyn Jones whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate Carolyn Jones for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Carolyn Jones and the unlawful written final warning to Jennifer Smith.

WE WILL, within 3 days thereafter, notify Carolyn Jones and Jennifer Smith in writing that this has been done and that the discharge and final warning will not be used against them in any way.

WE WILL hold a meeting or meetings at the facility, during working hours, at which this notice will be read aloud to you by Randall Coleman and Phil Smith (or the current senior vice president of operations and director of operations), in the presence of a Board agent, or by a Board agent in those officials' presence.

OZBURN-HESSEY LOGISTICS, LLC

The Board's decision can be found at http://www.nlrb.gov/case/26-CA-024057 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OZBURN-HESSEY LOGISTICS, LLC

and Case 15-CA-109236

UNITED STEEL, PAPER & FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE WORKERS

SUPPLEMENTAL NOTICE TO SHOW CAUSE

On August 22, 2013, the General Counsel filed with the Board a Motion for Summary Judgment on the ground that the Respondent is attempting to relitigate the issues in Case 26-RC-008635. On August 23, 2013, the Board issued an Order transferring this proceeding to the Board and Notice to Show Cause why the motion should not be granted. On September 6, 2013, the Respondent filed a response to the Notice to Show Cause, in which it stated, among other things, that it sought to test the validity of the certification of the Union.

Previously, on May 2, 2013, the Board issued a Decision, Order, and Direction in a consolidated unfair labor practice and representation proceeding involving Case 26-RC-008635, which is reported at 359 NLRB No. 109 (2013). Pursuant to that proceeding, an election was held and a Certification of Representative issued. However, at the time of the Decision, Order, and Direction, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. On June 27, 2014, the Board issued an

order setting aside its Decision, Order, and Direction and retained this case on its docket for further action as appropriate.

Thereafter, on November 17, 2014, the Board issued a Decision, Order and Certification, which is reported at 361 NLRB No. 100. There, the Board adopted the administrative law judge's rulings, findings, and conclusions, including the resolution of 10 challenged ballots at issue, found that the tally of ballots issued on May 14, 2013, accurately presents the results of the election in which the majority of valid ballots had been cast for the Union and, in an abundance of caution, issued a new Certification.

As noted above, the General Counsel's motion alleges, and the Respondent concurs in its response, that the Respondent refused to bargain for the purpose of testing the validity of the certification of representative in the U.S. Courts of Appeals. Although Respondent's legal position may remain unchanged, it is possible that the Respondent has or intends to commence bargaining at this time. It is also possible that other events may have occurred during the pendency of this litigation that the parties may wish to bring to our attention.

Having duly considered the matter,

1. The General Counsel is granted leave to amend the complaint on or before January 30, 2015, to conform with the current state of the evidence.

2. The Respondent's answer to the amended complaint is due on or before February 13, 2015.

NOTICE IS HEREBY GIVEN that cause be shown, in writing, on or before March 6, 2015 (with affidavit of service on the parties to this proceeding), as to why the Board

should not grant the General Counsel's motion for summary judgment. Any briefs or statements in support of the motion shall be filed by the same date.

Dated, Washington, D.C., January 20, 2015.

By direction of the Board:

Gary Shinners

Executive Secretary

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

OZBURN-HESSEY LOGISTICS, LLC	*	
and	*	Case 15-CA-109236
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION aka UNITED STEELWORKERS UNION	*	

AMENDED COMPLAINT AND NOTICE OF HEARING

Pursuant to Section 102.17 of the Rules and Regulations of the National Labor Relations Board (the Board), the Complaint and Notice of Hearing issued on July 30, 2013 in Case 15-CA-109236, filed by United Steelworkers Union, whose correct name is United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union (Union), alleging that Ozburn-Hessey Logistics, LLC (Respondent) violated the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act), by engaging in unfair labor practices is amended as follows:

1. The charge in this proceeding was filed by the Union on July 16, 2013, and a copy was served by U.S. mail on Respondent on July 17, 2013.

2(a) At all material times, Respondent has been a limited liability company with an office and places of business in Memphis, Tennessee (Respondent's facilities) and has been engaged in providing transportation, warehousing, and logistics services.

(b) In conducting its operations annually, Respondent performed services valued in excess of $50,000 in States other than the State of Tennessee.

(c) In conducting its operations annually, Respondent purchased and received at its Memphis, Tennessee facilities goods valued in excess of $50,000 directly from points outside the State of Tennessee.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, Karen White held the position of Respondent's Regional Vice President and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

6. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at its Memphis, Tennessee facilities located at: 5510 East Holmes Road; 5540 East Holmes Road; 6265 Hickory Hill Road; 6225 Global Drive; 4221 Pilot Drive; and 5050 East Holmes Road. Excluded: All other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

7. On November 17, 2014, the Board certified the Union as the exclusive collective-bargaining representative of the Unit.

8. At all times since November 17, 2014, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

9. About December 9, 2014, the Union, by letter, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

10. Since about January 13, 2015, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

11. By the conduct described above in paragraph 10, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

12. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the amended complaint. The answer must be **received by this office on or before February 13, 2015, or postmarked on or before February 12, 2013**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **File Case Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a

pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the amended complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on a **date, time and place to be determined**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this amended complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: January 30, 2015

M. Kathleen Mc CB

M. KATHLEEN MCKINNEY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 15
600 SOUTH MAESTRI PLACE, 7TH FLOOR
NEW ORLEANS, LOUISIANA 70130-3408

Attachments

FORM NLRB 4338
(6-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 15-CA-109236

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Karen White, Regional Vice President
Ozburn-Hessey Logistics, LLC
5510 E Holmes Rd
Memphis, TN 38118-7948

Ben H. Bodzy, Esq.
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
211 Commerce St Ste 800
Nashville, TN 37201-1817

Glen M. Connor, Esq.
Quinn Connor Weaver Davies & Rouco LLP
2700 Highway 280 Ste 380
Birmingham, AL 35223-2420

Richard J. Brean, General Counsel
United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied-Industrial And Service Workers International Union, AFL-CIO/CLC
60 Boulevard of the Allies
Five Gateway Center Room 807
Pittsburgh, PA 15222-1214

United Steelworkers Union
3340 Perimeter Hill Drive
Nashville, TN 37211

Form NLRB-4668
(6-2014)

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in**

(OVER)

evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

OZBURN-HESSESY LOGISTICS, LLC

and Case 15-CA-109236

UNITED STEELWORKERS UNION

OHL'S ANSWER TO AMENDED COMPLAINT AND NOTICE OF HEARING

Pursuant to NLRB Rules and Regulations 102.20 and 102.21, Ozburn-Hessey Logistics, LLC ("OHL") submits this Answer to Amended Complaint and Notice of Hearing ("Amended Complaint") and states as follows:

1.

OHL admits the allegations in Paragraph 1 of the Amended Complaint.

2.

OHL admits the allegations in Paragraphs 2(a-c) of the Amended Complaint.

3.

OHL admits the allegations in Paragraph 3 of the Amended Complaint.

4.

OHL admits the allegations in Paragraph 4 of the Amended Complaint.

5.

OHL admits the allegations in Paragraph 5 of the Amended Complaint.

6.

OHL denies the allegations in Paragraph 6 of the Amended Complaint.

7.

OHL admits that on November 17, 2014 the Board certified the USW as the exclusive Collective Bargaining Representative of the unit, but OHL denies that said certification was proper or valid.

8.

OHL denies the allegations in Paragraph 8 of the Amended Complaint.

9.

OHL admits that the union, by letter, requested that OHL bargain collectively with it. OHL denies that the USW is the exclusive collective bargaining representative of its employees, and it further denies that it was under obligation to bargain with the USW.

10.

OHL admits that since about November 17, 2014, it has refused to recognize and bargain with the USW as the exclusive collective bargaining representative of its Memphis employees. However, OHL denies that it has "failed" to recognize and bargain with the USW, since the certification of the USW was improper, and OHL is under no legal obligation to recognize it.

11.

OHL denies the allegations in Paragraph 11 of the Amended Complaint.

12.

OHL denies the allegations in Paragraph 12 of the Amended Complaint.

All allegations not specifically admitted are denied.

FIRST DEFENSE

The Amended Complaint fails, in whole or in part, to state a claim upon which relief may be granted.

SECOND DEFENSE

The certification of the USW resulted from counting ballots of voters who were ineligible to vote at the time of the election.

THIRD DEFENSE

The certification of the USW resulted from counting ballots of employees who were validly terminated by OHL prior to the election and who were therefore ineligible to vote.

FOURTH DEFENSE

The certification of the USW resulted from counting ballots of voters whose eligibility turned on cases pending before the United States Court of Appeals for the D.C. Circuit.

FIFTH DEFENSE

The certification of the USW resulted from the exclusion of eligible ballots case by two Administrative Assistants.

SIXTH DEFENSE

The certification of the USW resulted from an election that should have been set aside as a result of OHL's objections thereto.

SEVENTH DEFENSE

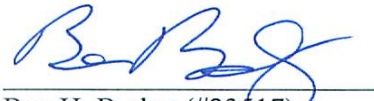
OHL is testing the validity of the certification of the USW.

EIGHTH DEFENSE

There is no underlying amended unfair labor practice charge that alleges that OHL was obligated to bargain based on the Board's November 17, 2014 certification, and the Region cannot pursue a Amended Complaint in the absence of an underlying unfair labor practice charge that sets forth the factual allegations in the Amended Complaint.

WHEREFORE, having fully answered the Amended Complaint, OHL requests that the Amended Complaint be dismissed with prejudice.

Respectfully submitted,



Ben H. Bodzy (#23517)
Stephen Goodwin (#006294)
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
Baker Donelson Center, Suite 800
211 Commerce Street
Nashville, Tennessee 37201
(615) 726-5600

Attorneys for Ozburn-Hessey Logistics, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Answer to Amended Complaint and Notice of Hearing* has been emailed and mailed, postage prepaid to:

Mr. Charles Rogers
National Labor Relations Board
Region 15
600 S Maestri Pl, Floor 7
New Orleans, LA 70130-3414

Mr. Glenn Connor
Quinn, Connor, Weaver, Davies & Rouco, LLP
2700 Highway 280 S, Suite 380
Birmingham, AL 35223-2420

this 13th day of February, 2015.

Ben H. Bodzy

N BHB 1471635 v1
2902696-000096 02/13/2015

Ozburn-Hessey Logistics, LLC *and* United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers. Case 15–CA–109236

June 15, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers (the Union) on July 16, 2013, the Acting General Counsel issued the complaint on July 30, 2013, alleging that Ozburn-Hessey Logistics, LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 26–RC–008635.[1] (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On August 22, 2013, the Acting General Counsel filed a Motion for Summary Judgment and a memorandum in support of Motion for Summary Judgment. On August 23, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Previously, on May 2, 2013, the Board issued a Decision, Order, and Direction in a consolidated unfair labor practice and representation proceeding involving Case 26–RC–008635, which is reported at 359 NLRB No. 109 (2013).[2] Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision, Order, and Direction in the consolidated proceeding involving Case 26–RC–008635, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. On June 27, 2014, the Board issued an order setting aside its Decision, Order, and Direction in the consolidated proceeding involving Case 26–RC–008635, and retained this case on its docket for further action as appropriate.

On November 17, 2014, the Board issued a Decision, Order and Certification in the consolidated unfair labor practice and representation proceeding involving Case 26–RC–008635, which is reported at 361 NLRB No. 100. There, the Board adopted the administrative law judge's rulings, findings, and conclusions, including the judge's resolution of 10 challenged ballots at issue, found that the tally of ballots issued on May 14, 2013, accurately presents the results of the election in which the majority of valid ballots had been cast for the Union, and, in an abundance of caution, issued a new Certification of Representative.[3]

On January 20, 2015, the Board issued a supplemental Notice to Show Cause in this proceeding. That notice provided leave to the General Counsel to amend the complaint on or before January 30, 2015, to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the November 17, 2014 certification of representative issued.

On January 30, 2015, the General Counsel filed an amended complaint alleging that following the issuance of the November 17, 2014 certification of representative, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit and that since about January 13, 2015, the Respondent has failed and refused to do so. On February 13, 2015, the Respondent filed an answer to the amended complaint in which it admitted the factual allegations of the complaint, reiterated many of the arguments made in the consolidated unfair labor practice and representation proceeding, and argued that the com-

[1] As set forth at fn. 1 of the Acting General Counsel's memorandum in support of Motion for Summary Judgment, Region 26 was merged into Region 15 on December 10, 2012. All documents that pertain to this case filed before that date are listed as originating in Region 26 and all documents that pertain to this case filed after that date are listed as originating in Region 15.

[2] That consolidated proceeding involved Cases 26–CA–024057, 26–CA–024065, 26–CA–024090, and 26–RC–008635.

[3] The Respondent filed a petition for review of the Board's unfair labor practice findings, the Union filed a motion to intervene, and the Board filed a cross-petition for enforcement. In an unpublished order filed on May 1, 2015, the United States Court of Appeals for the District of Columbia Circuit denied Respondent's petition for review and granted the Board's cross-petition for enforcement. *Ozburn-Hessey Logistics, LLC v. NLRB*, --- Fed.Appx. ----, 2015 WL 3369876, D.C. Cir., May 01, 2015 (No. 11–1482, 12–1063).

plaint should be dismissed because no new or amended charge was filed after the Board issued the November 17, 2014 certification of representative.

On March 6, 2015, the Respondent filed a response to the supplemental notice to show cause, and on March 12, 2015, the General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to recognize and bargain, but contests the validity of the certification on the basis of voter eligibility issues and objections alleged to have affected the results of the election in the representation proceeding. Many of these arguments were litigated in the consolidated unfair labor practice and representation proceeding involving Case 26–RC–008635. To the extent that the Respondent's arguments involve unfair labor practice issues that were resolved in that proceeding, those arguments are rejected. The court's disposition of these issues is final and they are barred from further litigation by the doctrine of res judicata.

As to issues not addressed in the prior proceeding, the Respondent argues that the amended complaint is somehow deficient because no new unfair labor practice charge was filed after the Board, in an abundance of caution, issued a new certification of representative on November 17, 2014. This argument is also rejected. The allegations in the amended complaint are part of a continuum of events that begin with the filing of a petition for a representation election in Case 26–RC–008635 and culminate with the Respondent's ongoing refusal to recognize and bargain with the Union for the purpose of testing the Board's certification of representative. These events are sufficiently related to the original charge in this matter to be included in the amended complaint. Indeed, as described above, the Board specifically granted the General Counsel leave to file an amended complaint to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the November 17, 2014 certification of representative issued.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a limited liability company with an office and place of business in Memphis, Tennessee (the Respondent's facilities), and has been engaged in providing transportation, warehousing, and logistics services.

In conducting its operations annually, the Respondent performed services valued in excess of $50,000 in states other than the State of Tennessee, and purchased and received at its Memphis, Tennessee facilities goods valued in excess of $50,000 directly from points outside the State of Tennessee.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on July 27, 2011, the Union was certified on November 17, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at its Memphis, Tennessee facilities located at 5510 East Holmes Road, 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road. Excluded: All other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

On about June 3, 2013, and December 9, 2015, the Union, by letter, requested that the Respondent bargain col-

[4] The Respondent's request that the complaint be dismissed with prejudice is therefore denied.

lectively with it as the exclusive collective-bargaining representative of the unit. Since about June 17, 2013, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union as the unit employees' exclusive collective-bargaining representative.[5]

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[6]

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Ozburn-Hessey Logistics, LLC, Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at its Memphis, Tennessee facilities located at 5510 East Holmes Road, 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road. Excluded: all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Memphis, Tennessee, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and

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[5] Although the amended complaint does not refer to the Union's June 3, 2013 written bargaining request or to the Respondent's June 17, 2013 refusal to bargain, those allegations are contained in the original complaint which is attached to the General Counsel's Motion for Summary Judgment as Exh. E. In addition, the Union's June 3, 2013 letter and the Respondent's June 17, 2013 refusal letter are attached to the General Counsel's memorandum in support of the Motion for Summary Judgment as Exhs. O and P, respectively.

[6] In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

> Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 17, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 15, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by us at our Memphis, Tennessee facilities located at 5510 East Holmes Road, 5540 East Holmes Road, 6265 Hickory Hill Road, 6225 Global Drive, 4221 Pilot Drive, and 5050 East Holmes Road. Excluded: all other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

OZBURN-HESSEY LOGISTICS, LLC

The Board's decision can be found at www.nlrb.gov/case/15–CA–109236 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Deferred Appendix was filed electronically with the Court's CM/ECF system and served via U.S. mail to the addresses described below this 7th day of January, 2016:

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s/BEN H. BODZY
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